

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
)	
EXTRACTION OIL & GAS, INC., <i>et al.</i> , ¹)	Case No. 20-11548 (CSS)
)	
Debtors.)	(Jointly Administered)
)	
EXTRACTION OIL & GAS, INC.,)	Adversary Proceeding
)	
Plaintiff,)	Adv. Pro. No. 20-50833 (CSS)
)	
v.)	Re: Adv. Docket No. 79
)	
PLATTE RIVER MIDSTREAM, LLC AND DJ)	
SOUTH GATHERING, LLC,)	
Defendants.)	
)	

**BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS**

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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 25, 2020

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	II
NATURE AND STAGE OF THE REJECTION PROCEEDINGS.....	1
SUMMARY OF ARGUMENT.....	2
STATEMENT OF FACTS.....	2
I. THE TRANSPORTATION AGREEMENTS.....	2
II. DEFENDANTS SEEK DECLARATORY JUDGMENT CONCERNING OBLIGATIONS UNDER THE TRANSPORTATION AGREEMENTS	3
III. THE COURT AUTHORIZED EXTRACTION’S REJECTION OF THE TRANSPORTATION AGREEMENTS	4
LEGAL STANDARD	4
ARGUMENT.....	5
I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE EXTRACTION IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.....	5
II. REJECTION RELIEVES EXTRACTION FROM ITS OBLIGATIONS UNDER THE TRANSPORTATION AGREEMENTS.....	6
CONCLUSION	8

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	4, 5
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	4, 5
<i>In re Goody's Family Clothing Inc.</i> , 610 F.3d 812 (3d Cir. 2010).....	5
<i>Kane v. Nat'l Union Fire Ins. Co.</i> , 535 F.3d 380 (5th Cir. 2008)	5
<i>Mission Prod. Holdings, Inc. v. Tempnology, LLC</i> , 139 S. Ct. 1652 (2019).....	2, 6
<i>N.L.R.B. v. Bildisco and Bildisco</i> , 465 U.S. 513 (1984).....	2
<i>Sharon Steel Corp. v. Nat'l Fuel Gas Distribution Corp.</i> , 872 F.2d 36 (3d Cir. 1989).....	6
<i>Matter of Swift</i> , 129 F.3d 792 (5th Cir. 1997))	5
<i>In re Taylor-Wharton Int'l LLC</i> , No. 09-14089 BLS, 2010 WL 4862723 (Bankr. D. Del. Nov. 23, 2010).....	6, 7
<i>In re Tribune Co.</i> , 972 F.3d 228 (3d Cir. 2020)	5

Rules

Federal Rule of Bankruptcy Procedure 7056.....	4
Federal Rule of Civil Procedure 1	4
Federal Rule of Civil Procedure 56	4

Other Authorities

3 Collier on Bankruptcy § 365.03(1) (15th ed.).....	6
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NATURE AND STAGE OF THE REJECTION PROCEEDINGS

On August 25, 2020, Extraction Oil & Gas, Inc. (“Extraction”) filed its Complaint for Declaratory Judgment, seeking a declaration that the Transportation Agreements (as defined below) did not create covenants that run with the land. *See Complaint for Declaratory Judgment* [A. D.I. 2]. Extraction also filed a Motion for Summary Judgment in support of its claims. *See Brief in Support of Plaintiff’s Motion for Summary Judgment* [A. D.I. 4].

On September 23, 2020, Platte River Midstream, LLC (“Platte River”) and DJ South Gathering, LLC (individually “DJ South,” and with Platte River, “Defendants”) filed their Answer to Complaint and Counterclaims. *See Defendants’ Answer to Complaint and Counterclaims* [A. D.I. 24]. In their answer, Defendants asserted two counterclaims. *See id.* at 15–16. In the first counterclaim, “Defendants seek a declaration from the Court that resolves the parties’ dispute by declaring that, under the TSAs, Extraction is obligated to deliver all crude oil produced from the Dedication Areas into the Transportation Systems for transportation.” *Id.* at 15. In the second counterclaim, “DJ South seeks a declaration from the Court that resolves the parties’ dispute by declaring that the DJ South TSA requires Extraction to deliver crude oil produced from the Rinn Valley Wells into the DJ South Transportation System for transportation.” *Id.* at 16.

On October 14, 2020, the Court found that the Transportation Agreements did not create covenants that run with the land. *See Findings of Fact and Conclusions of Law on Plaintiff’s Motion for Summary Judgment Against Platte River Midstream, LLC and DJ South Gathering, LLC* [A. D.I. 54] at 2–3. That same day, the Court entered judgment in Extraction’s favor on its declaratory judgment claims. *See Judgment* [A. D.I. 56]. The only remaining issues in this adversary proceeding are Defendants’ counterclaims.

Meanwhile, on November 2, 2020, the Court issued a Bench Ruling [D.I. 942], and on November 10, 2020, entered an Order Granting Motions to Reject Executory Contracts [D.I.

1038], authorizing Extraction’s rejection of the Transportation Agreements *nunc pro tunc* from the petition date. Consequently, Extraction no longer has any obligations under the Transportation Agreements as of that date. *See also N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 528 (1984) (“[T]he 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.”). As the Court already explained: “[R]ejection relieves the Debtors of their future obligations and only previously conferred rights are not rescinded.” *Bench Ruling* [D.I. 942] at 15 (citing *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1666 (2019)). Thus, Extraction does not have any remaining obligations under the TSA, and summary judgment should be entered in Extraction’s favor on Defendants’ counterclaims.

SUMMARY OF ARGUMENT

1. Extraction files this Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure as made applicable to this adversary proceeding pursuant to Rules 7001 and 7056 of the Federal Rules of Bankruptcy Procedure, for entry of an order granting summary judgment in Extraction’s favor and against Defendants on Defendants’ Counterclaims. Extraction is entitled to summary judgment because, as a matter of law, Extraction no longer has any performance obligations under the Transportation Agreements because the Court approved Extraction’s rejection of the Transportation Agreements under the Bankruptcy Code.

STATEMENT OF FACTS

I. THE TRANSPORTATION AGREEMENTS

On May 14, 2017, Extraction and Platte River entered into the First Amended and Restated Transportation Services Agreement (the “Platte River Contract”). A true and correct copy of the Platte River Contract was attached as **Exhibit A** to Extraction’s Complaint for Declaratory Judgment [A. D.I. 2]. On May 16, 2018, Extraction and DJ South entered into the Transportation

Services Agreement (as amended, the “DJ South Contract,” together with the Platte River Contract, the “Transportation Agreements”). A true and correct copy of the DJ South Contract was attached as **Exhibit B** to Extraction’s Complaint for Declaratory Judgment [A. D.I. 2].

II. DEFENDANTS SEEK DECLARATORY JUDGMENT CONCERNING OBLIGATIONS UNDER THE TRANSPORTATION AGREEMENTS

On September 23, 2020, Defendants asserted two counterclaims for declaratory judgment. *See Defendants’ Answer to Complaint and Counterclaims* [A. D.I. 24] at 15–16. “Defendants [brought] these counterclaims to seek judicial declarations *concerning Extraction’s obligation under the parties’ contracts* to transport all crude oil produced within the dedication areas on Defendants’ pipeline transportation systems.” *Id.* at 8 (emphasis added).

More specifically, in the first counterclaim, Defendants alleged that “a dispute exists between Defendants and Extraction regarding whether the [Transportation Agreements] require Extraction to deliver all production from the Dedication Areas into the Transportation Systems for transportation.” *Id.* at 15. Thus, “Defendants seek a declaration from the Court that resolves the parties’ dispute by declaring that, under the TSAs, Extraction is obligated to deliver all crude oil produced from the Dedication Areas into the Transportation Systems for transportation.” *Id.*

Likewise, in the second counterclaim, Defendants alleged that “a dispute exists between DJ South and Extraction concerning whether the DJ South TSA requires Extraction to deliver crude oil produced from the Rinn Valley Wells into the DJ South Transportation System for transportation.” *Id.* at 16. Thus, “DJ South seeks a declaration from the Court that resolves the parties’ dispute by declaring that the DJ South TSA requires Extraction to deliver crude oil produced from the Rinn Valley Wells into the DJ South Transportation System for transportation.” *Id.*

III. THE COURT AUTHORIZED EXTRACTION'S REJECTION OF THE TRANSPORTATION AGREEMENTS

After finding that the Transportation Agreements did not create covenants running with the land and entering summary judgment accordingly,¹ the Court considered the issue of rejection in the underlying chapter 11 case. On November 2, 2020, the Court authorized Extraction's rejection of the Transportation Agreements. *See Bench Ruling* [D.I. 942 in the chapter 11 case. Specifically, the Court concluded "[i]f the [relevant contract is] rejected, this simply results in a breach of the contracts, and the covenants therein, and not a termination of those contracts." *Id.* at 17. The Court explained, "rejection allows a debtor to stop performing its obligations" *Id.* Thus, rejection "relieve[s] the Debtors of all future performance obligations to deliver its oil to [the Defendants] 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." *Id.*

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a)—made applicable to this action under Federal Rule of Bankruptcy Procedure 7056—the "[C]ourt shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). The existence of *some* factual dispute will not defeat summary judgment; rather, the requirement is that no *genuine* issue of *material* fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp.*, 477 U.S. at 327. A genuine dispute of material fact exists only if a reasonable trier of fact could enter a verdict in favor of the non-

¹ See Findings of Fact and Conclusions of Law on Plaintiff's Motion for Summary Judgment Against Platte River Midstream, LLC and DJ South Gathering, LLC [A. D.I. 54] at 2–3; Judgment [A. D.I. 56].

moving party. *Anderson*, 477 U.S. at 252; *Celotex Corp.*, 477 U.S. at 327 (holding when a movant’s evidence demonstrates the lack of a genuine issue the burden shifts to the opposing party to demonstrate the existence of a genuine issue for trial).

ARGUMENT

The Court should grant summary judgment in Extraction’s favor and against Defendants on Defendants’ counterclaims. Summary judgment is appropriate because Extraction is entitled to judgment as a matter of law. Extraction rejected the Transportation Agreements, and, therefore, Extraction no longer has performance obligations thereunder.

I. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE EXTRACTION IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Summary judgment in Extraction’s favor is appropriate because Extraction rejected the Transportation Agreements; under straightforward application of the Bankruptcy Code, as well as this Court’s prior rulings on this issue, Extraction no longer has any obligations under the rejected contracts.

Defendants request a declaration that Extraction is obligated to perform under the now-rejected Transportation Agreements. *See* Defendants’ Answer to Complaint and Counterclaims [A. D.I. 24] at 15–16. Post-rejection, however, Extraction no longer has any such performance obligation. The Court’s assessment of rejection’s impact on Extraction’s contractual obligations, as well as the application of its prior rulings on this issue, is a question of law. *See, e.g., In re Tribune Co.*, 972 F.3d 228, 237 (3d Cir. 2020) (“We exercise plenary review of the District Court’s conclusions of law, including its interpretation of the Bankruptcy Code.”) (citing *In re Goody’s Family Clothing Inc.*, 610 F.3d 812, 816 (3d Cir. 2010)); *Kane v. Nat’l Union Fire Ins. Co.*, 535 F.3d 380, 384 (5th Cir. 2008) (“Questions of law, including interpretation and application of the Bankruptcy Code, are reviewed de novo.”) (citing *Matter of Swift*, 129 F.3d 792, 795 (5th Cir.

1997)). Thus, the Court can resolve Defendants' counterclaims as a matter of law, and no factual dispute precludes summary judgment.

II. REJECTION RELIEVES EXTRACTION FROM ITS OBLIGATIONS UNDER THE TRANSPORTATION AGREEMENTS

Once a debtor rejects a contract in bankruptcy, the debtor is relieved of any performance obligations under the contract. Here, the Court has authorized Extraction's rejection of the Transportation Agreements. Consequently, Extraction is relieved of its performance obligations under the Transportation Agreements (as this Court has already held), Defendants are not entitled to the declarations they seek as a matter of law, and summary judgment in Extraction's favor is appropriate.

On November 2, 2020, the Court issued a Bench Ruling [D.I. 942], and on November 10, 2020, entered an Order Granting Motions to Reject Executory Contracts [D.I. 1038], authorizing Extraction's rejection of the Transportation Agreements. Rejection of a contract in bankruptcy relieves Extraction from its performance obligations under the rejected contracts; the Supreme Court of the United States, the Third Circuit, and this court uniformly so hold. *See, e.g., Mission Prod. Holdings, Inc.*, 139 S. Ct. at 1662 ("And because rejection 'constitutes a breach,' . . . the same consequences follow in bankruptcy. The debtor can stop performing its remaining obligations under the agreement.") (internal citations omitted); *Sharon Steel Corp. v. Nat'l Fuel Gas Distribution Corp.*, 872 F.2d 36, 40 (3d Cir. 1989) ("Sharon's rejection of the service agreement under [section] 365 merely relieves National Fuel and Sharon from their respective obligations *under the contract*.") (emphasis in original); *In re Taylor-Wharton Int'l LLC*, No. 09-14089 BLS, 2010 WL 4862723, at *3 (Bankr. D. Del. Nov. 23, 2010) (noting "[r]ejection relieves the estate of the debtor's remaining obligations under the contract") (citing 3 Collier on Bankruptcy § 365.03(1) (15th ed.)). This Court said it best when it explained that rejection of

these very same Transportation Agreements “relieve[s] the Debtors of all future performance obligations to deliver its oil to [the Defendants] 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.” *Bench Ruling* [D.I. 942] at 17.

The relief that Defendants seek are declarations concerning Extraction’s ongoing performance obligations under the Transportation Agreements. *See Defendants’ Answer to Complaint and Counterclaims* [A. D.I. 24] at 15–16. However, “the effect of rejection is to relieve a debtor from future performance under the contract” *In re Taylor-Wharton Int’l LLC*, 2010 WL 4862723, at *3; *accord Bench Ruling* [D.I. 942] at 17 (noting rejection “relieve[s] the Debtors of all future performance obligations”). Accordingly, even if Extraction was obligated to take the actions alleged in the counterclaims prior to rejection,² those obligations were nevertheless relieved by rejection. Consequently, Defendants are not entitled to their requested relief as a matter of law. Concerning their first counterclaim, Defendants are not entitled to a declaration “that, under the TSA, Extraction is obligated to deliver all crude oil produced from the Dedication Areas into the Transportation Systems for transportation.” *See Defendants’ Answer to Complaint and Counterclaims* [A. D.I. 24] at 15. Likewise, Defendants are not entitled to the relief requested in their second counterclaim; specifically, Defendants are not entitled to a declaration “that the DJ South TSA requires Extraction to deliver crude oil produced from the Rinn Valley Wells into the DJ South Transportation System for transportation.” *Id.* at 16. The Court should, therefore, enter judgment on both claims in Extraction’s favor.

² The second counterclaim alleges that the DJ South Contract required Extraction to deliver crude oil produced from the Rinn Valley Wells into the DJ South Transportation System. Defendants are wrong. The Court need not decide this issue here, however, because (to the extent they existed) Extraction was relieved of its ongoing performance obligations via rejection, as discussed above.

CONCLUSION

Defendants seek declarations that Extraction has ongoing performance obligations under the Transportation Agreements. As this Court has already held, however, rejection of these Transportation Agreements has relieved Extraction of all future performance obligations under these contracts as of the petition date. As a result, summary judgment in Extraction's favor is appropriate on Counts One and Two of the Defendants' Counterclaims.

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Dated: November 25, 2020
Wilmington, Delaware

/s/ Stephen B. Gerald

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