IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: EXTRACTION OIL & GAS, INC., *et al.*, Debtors.	Bankruptcy Case No. 20-11548 (CSS) (Jointly Administered)
PLATTE RIVER MIDSTREAM, LLC, DJ SOUTH GATHERING, LLC, AND PLATTE RIVER HOLDINGS, LLC, Appellants, v. EXTRACTION OIL & GAS, INC., Appellee.	Civil Action No. 20-1532 (CFC) CONFIDENTIAL FILING

APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY PENDING APPEAL

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Without a stay, Extraction's rejection of the contracts will irreparably harm Appellants.[1] Extraction can immediately begin diverting production from Appellants' pipelines, thereby depriving Appellants of the tariffs they need to avoid insolvency. *See* Mot., Exhibit A at ¶¶12-15. Because Extraction is the primary source of Appellants' revenue, the loss of tariffs will force them to file bankruptcy or cease operating before the Court can decide their appeal. *See id*.

Appellants' harm is not "self-inflicted," as Extraction claims. Resp. at 1-2, 15. They have not refused to transport Extraction's oil production (*contra* Resp. at 15), and regardless, temporarily transporting oil for Extraction will not avoid the irreparable harm. Extraction seeks to use Appellants only on an interim basis as a "walk-up shipper" until it secures alternative transportation. *See* Mot., Exhibit E, at 193:21-194:2 (describing Extraction's intent to temporarily use Appellants' pipelines). "Walk up shipping," which Extraction can discontinue at its sole discretion, will not avoid Appellants' financial ruin. Only a stay will avoid irreparable harm.

A stay is particularly appropriate given the strength of Appellants' arguments and likelihood of reversal. In particular, the Order rests on a fundamental misreading of *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019), that

[1] Capitalized terms in this Reply have the same meanings as in the Motion.

rejection does not rescind or avoid rights granted to the nondebtor under the contract. *See* Mot. at 11-13. The court committed other, demonstrable legal errors, including its misreading of Colorado law and the effect of covenants running with the land on rejection of executory contracts. *See id.* at 8-14. Extraction offers nothing to support the court's rulings on these issues, other than repeating arguments presented below. *See* Resp. at 5-15.

Finally, a stay will not "open the floodgates," nor will it undermine the Bankruptcy Code. *Id.* at 2, 16-17. The bankruptcy rules provide for stays pending appeal, and the Court may issue a stay based on the factors adopted by the Third Circuit. *See* Fed. R. Bank. P. 8007(b); *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015); *In re Freedom Commc'ns Holdings, Inc.*, 2009 WL 4506553, at *1 (D. Del. Dec. 4, 2009).

I. Extraction Does Not Refute Appellants' Demonstration of Irreparable Harm.

Appellants face imminent irreparable harm absent a stay. Extraction is the largest shipper on Appellants' pipelines, accounting for approximately 90% of the oil transported on the PRM system, and 75% of the oil transported on the DJ South system. Mot., Exhibit A, at ¶¶12-15. Appellants' pipelines were built for the very purpose of transporting Extraction's production. *Id.* at ¶¶5-8. Without the tariffs paid by Extraction, Appellants face bankruptcy within a month. *Id.* at ¶14. Indeed, Appellants' lender has declared Appellants in default of their loan, and delivered a

reservation of rights letter, reserving the right to accelerate Appellants' payment obligations at any time. *See id.* at ¶15. This creates a separate path to Appellants' imminent bankruptcy. *See, e.g.*, *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir. 2011) (affirming injunction where evidence showed plaintiff otherwise would go out of business).

These facts are supported by the declaration of Appellants' CFO, Rogan McGillis. *See* Mot., Exhibit A, at ¶¶12-15. Notably, Extraction does not dispute any of these facts. Instead, it offers a series of unsupportable arguments.

Extraction initially claims Appellants' harm is "a catastrophe of their own making," because they have considered refusing to allow Extraction to use their pipelines on an interim basis as a "walk-up shipper." Resp. at 1-2. Appellants continue to transport Extraction's oil, and in fact, have sought a stay of the Order so both parties remain bound to their contractual obligations, thereby preserving the status quo. *See* Mot. at 7 (describing effect of stay). Extraction, by contrast, seeks to use Appellants only on an interim basis as a "walk-up shipper" until it secures alternative transportation. *See* Mot., Exhibit E, at 193:21-194:2. In fact, Extraction is already diverting substantial volumes from the PRM system. Appellants cannot remain solvent if Extraction removes its production from their systems, and therefore, there is no short-term solution to Appellants' looming insolvency. *See*

Mot., Exhibit A, at ¶¶12-15. Only a stay can prevent irreparable harm. *See Minard Run Oil Co.*, 670 F.3d at 255.

Extraction also posits Appellants' harm is "speculative," Resp. at 15-16, but ignores Mr. McGillis' declaration stating Appellants depend on Extraction's tariffs to remain viable. *See* Mot., Exhibit A, at ¶¶13-14. Without those tariffs, Appellants will be insolvent within a month, long before this Court can decide their appeal. *See id*. Extraction similarly ignores that Appellants' lender has stated its intention to accelerate obligations under Appellants' loan due to rejection. *See id.* at ¶15. Extraction cannot avoid these facts by ignoring them.

Equally baseless is Extraction's claim that, even if Appellants face imminent bankruptcy, such harm is not considered irreparable. *See* Resp. at 1. Extraction cites no caselaw supporting this assertion. Nor can it. Imminent insolvency or financial ruin constitutes irreparable harm. *See* Mot. at 6 (collecting cases); *see also Minard Run Oil Co.*, 670 F.3d at 255 ("[A]n exception [to the economic injury rule] exists where the potential economic loss is so great as to threaten the existence of the movant's business.") (citations and internal quotations omitted).

In reality, it is Extraction's claim of harm from a stay that is supported only by "naked assertions." Resp. at 18. Extraction, a billion-dollar company, claims a stay will interfere with its restructuring and hamstring its bankruptcy exit. *See id.* at 18-19. But Extraction offers no evidentiary support for these assertions, and the

indisputable facts are to the contrary. Extraction concedes it will garner only $25 to $32 million in 2021 by rejecting the PRM contract, and $4.5 to $5.5 million in 2021 by rejecting the DJ South contract. *See* Mot., Exhibit F, at 3, 5. These relatively modest savings have no bearing on Extraction's restructuring. *See* Mot. at 7-8. Extraction does not dispute these facts nor explain why these savings are somehow crucial to its post-bankruptcy operations. *See* Resp. at 17-19.

The harms facing the parties are not comparable. If the rejection order is stayed, Appellants will continue transporting Extraction's production, thereby providing them with the chance to avoid bankruptcy. Meanwhile, a stay will have no effect on Extraction's exit from bankruptcy. *See* Resp. at 18-19 (offering no evidence of negative effects). Without a stay, Appellants face insolvency and financial ruin in a matter of weeks. *See* Mot. Exhibit A, at ¶¶12-15. These circumstances support a stay pending this appeal. *See Minard Run Oil Co.*, 670 F.3d at 255 (affirming injunction based on potential severe economic loss); *Newlife Homecare Inc. v. Express Scripts, Inc.*, 2007 WL 1314861, at *5 (M.D. Penn. May 4, 2007) (imminent bankruptcy constituted irreparable harm).

II. Extraction's Embrace of the Bankruptcy Court's Errors Is Unavailing.

Extraction does not dispute Appellants need only demonstrate "a reasonable chance, or probability, of winning." *Revel AC*, 802 F.3d at 568 (citation and internal

quotations omitted). Appellants' arguments on appeal, and the likelihood of reversal, amply satisfy this standard.

While Extraction claims the court "carefully considered" the issues, Resp. at 5, this Court will consider many of those issues *de novo*. As Appellants showed, the Supreme Court held in *Mission Product* that rejection *does not* rescind or terminate rights granted to the nondebtor under the contract. Yet that is precisely what the court's ruling purports to do—terminate Appellants' rights under the contracts. This is reversible error.

Even if the contracts can be rejected, Appellants retain their dedication rights. Under *Mission Product*, rejection is a breach, but does not rescind the contract or revoke the parties' rights. 139 S. Ct. at 1662. "[T]he debtor and counterparty do not go back to their pre-contract positions. Instead, *the counterparty retains the rights it has received under the agreement*." *Id.* (emphasis added). This applies to all contractual rights, not merely real property interests.[2] *See id.* at 1663. The general rule is "contractual rights survive rejection." *Id.* at 1664.

Nor does rejection limit Appellants to a damages claim. The choice of remedies *is for Appellants* as the nonbreaching party. *See id.* at 1662. Appellants

[2] The contract in *Mission Product*—a trademark license—did not convey any interest in property. 1 Pat. L. Fundamentals § 5:71 (2d ed.) ("A trademark license, like a patent license, does not involve a transfer of any property interest …, but rather is only a promise not to sue for what but for the license would be an infringement.")

can retain their rights under the contracts while suing for damages, or they can terminate. *See id.* at 1662. Upon breach, Appellants [redacted] Mot., Exhibit B §11.3(d); Exhibit C §12.3(d). A negative covenant such as the dedications can be enforced through equitable means, in addition to money damages. *See, e.g.*, *In re Hruby*, 512 B.R. 262, 267 (Bankr. D. Colo. 2014) (damages and injunctive relief were cumulative remedies under Colorado law). Appellants can claim damages for breach *and* seek equitable relief to enforce the dedications.[3] *Mission Product*, 139 S. Ct. at 1662.

Extraction's cited authorities do not yield a contrary result. The court in *Farmers' High Line Canal & Reservoir Co. v. N.H. Real Estate Co.*, 92 P. 290, 294 (Colo. 1907), held damages are among available remedies for breach of a covenant. The court did not, as Extraction suggests, hold damages are the sole or even primary remedy. Though Extraction correctly quotes a treatise as stating "a court of law" can grant only "money damages" for the breach of a covenant running with the land, the treatise also says equitable remedies are available in courts of equity. 2 A. James Casner, ed., *American Law of Property: A Treatise on the Law of Property in the United States* (1952) at 363.

[3] This will not result in a double recovery. Under Extraction's bankruptcy plan, Appellants stand to receive a fraction of their damages, in the form of common stock. This partial payment does not eliminate Appellants' nonmonetary remedies.

Finally, the court and Extraction wrongly rely on *In re Arden & Howe Assocs., Ltd.*, 152 B.R. 971, 972 (Bankr. E.D. Cal. 1993), for the proposition that a real covenant does not survive rejection. Congress viewed the decision as so misguided it amended the Bankruptcy Code the following year to abrogate that result. *See* Bankruptcy Reform Act of 1994, Section-by-Section Analysis, 140 Cong. Rec. 27465 at 27694 (Oct. 4, 1994) (noting amendment to Bankruptcy Code expressly addressed *Arden & Howe*'s incorrect holding). Extraction attempts to downplay the legislative history by distinguishing between leases and executory contracts. Resp. at 11, n.3. Regardless, the point remains that *Arden & Howe* is no longer good law.

The court also misinterpreted Colorado law on the creation of covenants running with the land. Mot., Exhibit G, at 22-44. Extraction repeats these errors, *see* Resp. at 5-11, but its arguments fail for the same reasons that the Court ultimately will reverse the Order.

Colorado does not require horizontal privity to create a covenant running with the land, and no Colorado court has recognized privity as a necessary element. *See, e.g.*, *Reishus v. Bullmasters, LLC*, 409 P.3d 435, 440 (Colo. App. 2016) ("To create a real covenant, the parties must intend for the covenant to run with the land and bind their successors in interest, and the covenant must 'touch and concern' the land."). The Colorado cases relied upon by the Bankruptcy Court and Extraction all concern *vertical*, not horizontal privity, and none of them holds privity is necessary

to create a covenant running with the land. *See Taylor v. Melton*, 274 P.2d 977, 981-82 (Colo. 1954); *Farmers*, 92 P. at 293; *Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898).

The court also erred in applying the elements for creating a covenant running with the land, importing Texas law as interpreted in *In re Sabine Oil & Gas Corp.*, 567 B.R. 869 (S.D.N.Y. 2017). *See* Mot., Exhibit G, at 30 (favorably quoting *Sabine*). The PRM contract expressly demonstrates the parties' intent to create a covenant binding real property, because it states that Extraction dedicates [redacted] *Id.* at 7 (quoting contract) (emphasis added). Colorado law does not require intent to be "expressed in specific or magical terms." *TBI Expl. v. Belco Energy Corp.*, 2000 WL 960047, at *4 (5th Cir. June 14, 2000).

The court similarly erred by determining the contracts do not touch and concern Extraction's mineral interests. Mot., Exhibit G, at 25-30. Extraction repeats this error, arguing the contracts merely "identify" the minerals dedicated to Appellants' pipelines but do not affect the use of Extraction's minerals. Resp. at 8-9. This argument was rejected by two bankruptcy courts considering similar transportation contracts. *See In re Alta Mesa Res., Inc.*, 613 B.R. 90, 105 (Bankr. S.D. Tex. 2019); *In re Badlands Energy, Inc.*, 608 B.R. 854, 868 (Bankr. D. Colo.

2019). In both cases, the courts noted that dedications of interests directly affect the producer's use of its minerals, because they obligate the producer to transport those minerals on a specific pipeline. *See Alta Mesa*, 613 B.R. at 102-05; *Badlands*, 608 B.R. at 868-70. Extraction does not address the cases, which the court also disregarded. *See* Mot., Exhibit G, at 25-35.

These legal errors are in addition to significant *factual* errors committed by the Bankruptcy Court. *See* Mot. at 14-17 (describing errors). For example, the court justified rejection of the DJ South contract so that Extraction can transport oil to Platteville. Mot., Exhibit H at 5. *But the DJ South pipeline already delivers oil to Platteville.* *See* Mot., Exhibit H at 8 n. 19 (quoting testimony concerning *PRM* contract). Surprisingly, Extraction repeats the Bankruptcy Court's factual error in its Response. *See* Resp. at 18. Such errors require reversal.

All of these issues offer Appellants "a reasonable chance, or probability, of winning." *Revel AC*, 802 F.3d at 568 (citation and internal quotations omitted). A stay is warranted.

III. The Bankruptcy Code Authorizes a Stay, and No Bond Should Be Required.

Extraction claims a stay would "upend the fundamental policy of bankruptcy law" and "open the floodgates to countless similar claims" supporting a stay. Resp. at 1-2, 16. Not so. The bankruptcy rules expressly contemplate stays pending appeal where the requisite standards are satisfied. *See* Fed. R. Bank. P. 8007(b). Federal

law also recognizes the parties' right to appeal "final judgments, orders, and decrees … of bankruptcy judges" to this Court. 28 U.S.C. § 158(a). Here, a stay is warranted to preserve the Court's authority to meaningfully review the Bankruptcy Court's decisions. *See, e.g.*, *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (stay ensures parties' right "to have their cases independently reviewed by an appellate tribunal").

This Court can capably control the floodgates by applying the standards for a stay set forth in Bankruptcy Rule 8007. *See Revel AC*, 802 F.3d at 568. Here, those standards are satisfied, particularly given Appellants' irreparable harm. *See Minard Run Oil Co.*, 670 F.3d at 255. Finally, Extraction offers no evidence of monetary harm, and thus no bond should be required. *See In re Los Angeles Dodgers LLC*, 465 B.R. 18, 38 (D. Del. 2011).

For the reasons set forth above and in their Motion, Appellants request the Court enter a stay pending appeal.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Bankruptcy Rules 8013(f)(3)(C) and 8015(h), this Reply complies with the type-volume limitation set forth in Bankruptcy Rule 8013(f)(3)(C) because it contains 2,600 words as determined by the Word Count feature of Microsoft Word.

Dated: November 30, 2020
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CERTIFICATE OF SERVICE

I, Taylor M. Haga, hereby certify that I am not less than 18 years of age, and that service of the foregoing *Appellants' Reply in Support of Emergency Motion to Stay Pending Appeal* was caused to be made on November 30, 2020, as indicated, on service list below.

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