

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: § Chapter 11
EXTRACTION OIL & GAS, INC., *et al.*, § Case No. 20-11548 (CSS)
Debtors. § (Jointly Administered)

**CITY AND COUNTY OF BROOMFIELD, CO.'S
OBJECTION TO ASSUMPTION OF EXECUTORY CONTRACT**

The City and County of Broomfield, Colorado (“Broomfield”) hereby files its Objection to the Assumption of the Amended Oil and Gas Operator Agreement (the “Operator Agreement”) dated October 24, 2017 by and between Broomfield and Extraction Oil and Gas, Inc. (the “Debtor”) and in support thereof respectfully represents as follows:

Background

1. On or about October 24, 2017, Broomfield and the Debtor entered into the Operator Agreement which, among other things, governs how the Debtor will operate its oil and gas exploration and development activities in Broomfield, Colorado. Broomfield and the Debtor also agreed to a set of Best Management Practices for Well Sites and New Wells at Well Sites (the “BMPs”), which were incorporated into the Operator Agreement and attached thereto as Exhibit B.

2. Section 6 of the Operator Agreement provides:

[Extraction] shall comply with all applicable state and federal law with all applicable state and federal laws and regulations. [Extraction] will employ the BMPs on all New Wells and at all Well Sites...

3. Section 15 of the Operator Agreement further provides:

[Broomfield] reserve the right in the future to enact and apply prospectively regulations that are general in nature and that are applicable to all commercial and industrial operations in the City, even though such regulations may be more or less



stringent than the standards applicable to the Well Sites by virtue of this Agreement; provided that such regulations are not preempted by state law...

4. Among the applicable laws and regulations that the Debtor is required to comply is Emergency Ordinance No. 2117, Restrictions on Noise in Residential Areas (the "Ordinance") adopted by Broomfield in January 2020. Extraction failed to conform its business practices to the Ordinance resulting in Broomfield filing multiple criminal citations against Extraction.

5. On October 7, 2020, the Broomfield Municipal Court entered a judgment of conviction against Extraction for its repeated violations of the Ordinance. Extraction has appealed its conviction and has commenced litigation against Broomfield in the United States District Court for the District of Colorado, under Case No. 20-cv-02779, in which Extraction asserts that the Ordinance violates the due process and equal protection clauses of the United States Constitution.

6. Section 23 of the BMPs provides:

Permanent perimeter fencing shall be installed around production equipment unless such fencing is not required by the Visual Mitigation Plan for a Well Site, and shall be secured. The main purpose of the fencing is to deter entrance by unauthorized people and a Well Site shall be properly secured prior to the commencement of drilling at the Well Site. [Extraction] shall use visually interesting fencing, when feasible...If a chain link fence is required to achieve safety requirements...then landscaping and other screening mechanisms shall be required that comply with the City's Land Use Code regulations and the Operator's safety requirements.

7. On June 14, 2020, Extraction filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Extraction has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

8. During its Bankruptcy Case, Extraction has failed to comply with Section 23 of the BMPs with respect to its Livingston pad site. Specifically, the berming and fencing constructed by Extraction did not meet the requirements of the BMPs and the equipment was not properly

painted. Upon information and belief, Extraction has properly painted its equipment, but it has not addressed the berming and fencing issues.

9. On December 4, 2020, the Debtor filed its Plan Supplement that included a list of contracts that the Debtor seeks to assume (the “Executory Contracts”) pursuant to its Third Amended Joint Plan of Reorganization (the “Plan”) and 11 U.S.C. § 365(b). The Operator Agreement is identified as one of the Executory Contracts.

10. The Plan Supplement asserts that Extraction has no cure obligations with respect to its request to assume the Operator Agreement.

Objection

11. Broomfield objects to assumption of the Operator Agreement because Extraction has not proposed to promptly cure the defaults existing under the Operator Agreement and Extraction has failed to offer Broomfield adequate assurances that it will perform under the Operator Agreement in the future.

12. Under Section 365(b)(1) of the Bankruptcy Code, in order to assume an executory contract, under which there has been a default, the debtor in possession must, at the time of assumption: (a) cure, or provide adequate assurance that it will promptly cure, such default; (b) compensate or provide adequate assurance that it will promptly compensate the counter-p[arty for actual pecuniary losses resulting from such default, and (c) provide adequate assurance of future performance under such lease. 11 U.S.C. § 365(b)(1).

A. Extraction Has Failed to Provide Adequate Assurance of Prompt Cure and Future Performance.

13. "Adequate assurance of a prompt cure requires that there be a firm commitment to make all payments and at least a reasonably demonstrable capability to do so." In re Embers 86th

St., 184 B.R. 892, 900-01 (Bankr. S.D.N.Y. 1995) (quoting *In re R.H. Neil, Inc.*, 58 Bankr. 969, 971 (Bankr. S.D.N.Y. 1986); accord *In re World Skating Ctr., Inc.*, 100 B.R. 147, 148-49 (Bankr. D. Conn. 1989) ("Adequate assurance requires a foundation that is nonspeculative and sufficiently substantive so as to assure the landlord that it will receive the amount of the default."). Extraction provides no justifiable basis for its ability to promptly cure its defaults under the Operator Agreement. In fact, Extraction denies the existence of any defaults. Extraction has therefore failed to provide adequate assurance that it will promptly cure defaults under the Operator Agreement.

14. The Plan simply provides that cure costs will be paid in cash on the Effective Date or as soon thereafter is practicable. There is nothing in the Plan that supports Extraction's ability to satisfy every requirement under section 365(b)(1). Accordingly, Extraction's argument that it has provided adequate assurance that it will promptly cure the default under the Operating Agreement is unavailing.

15. Similarly, Extraction fails to provide adequate assurance of future performance. To determine whether a debtor has provided adequate assurance of future performance, bankruptcy courts have considered the following factors: "(1) whether the debtor's financial data indicates its ability to generate an income stream sufficient to meet its obligations; (2) the general economic outlook in the debtor's industry; and (3) the presence of a guarantee." *In re Patriot Place, Ltd.*, 486 B.R. 773, 801 (Bankr. W.D. Tex. 2013) (citing *In re Texas Health Enters. Inc.*, 72 Fed. App'x 122, 126 (5th Cir. 2003)). Additional factors courts have considered include: "(1) the debtor's payment history; (2) presence of a security deposit; (3) evidence of profitability; (4) plan that would earmark money exclusively for the landlord; and (5) whether the unexpired lease is at, or below, the prevailing rate." *Patriot Place*, 486 B.R. at 801. "Speculative, conjectural, or unrealistic projections cannot support a debtor's prediction of future performance." *Id.*

16. Because the Plan fails to provide adequate assurance of future performance and adequate assurance of prompt cure upon assumption, Extraction has failed to meet the requirements to assume under section 365(b)(1).

B. Extraction's Proposed Cure Amount is Incorrect and Extraction Has Failed to Provide for Cure of Non-Monetary Defaults

17. Extraction's assertion that its monetary cure amount is \$0 with respect to the Operator Agreement is incorrect. Under the BMPs, Extraction is obligated to provide adequate berming and fencing related to its Livingston pad site. The cost to bring the Livingston pad site into compliance with the BMPs is a cost that must be paid in connection with any assumption of the Operator Agreement.

18. In addition to the monetary defaults, Extraction is also in default under the Opeartor Agreement by failing to comply with the Ordinance. Extraction must promptly cure these defaults. However, neither the Plan nor the Plan Supplement address these defaults, let alone provide for how Extraction plans to cure those defaults.

Wherefore, Broomfield respectfully requests that this Court: (i) sustain this Objection; (ii) deny Extraction's assumption of the Operator Agreement; and (iii) grant Broomfield such other and further relief as is appropriate and just under the circumstances.

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Dated: December 11, 2020

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2020, I served a true and correct copy of the foregoing to the following via this Court's ECF electronic filing system.

December 11, 2020, 2020

/s/ Evan Rassman

Evan Rassman (DE 6111)

Via Electronic Mail

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