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)
EXTRACTION OIL & GAS, INC.,	
Plaintiff,	Adv. Proc. No. 20-50833 (CSS)
v.	**RE: A. D.I. 86**
PLATTE RIVER MIDSTREAM, LLC AND DJ SOUTH GATHERING, LLC,	
Defendants.	

NOTICE OF FILING OF PROPOSED REDACTED VERSION OF PLATTE RIVER MIDSTREAM, LLC AND DJ SOUTH GATHERING, LLC'S RESPONSE IN OPPOSITION TO EXTRACTION OIL & GAS, INC.'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS

PLEASE TAKE NOTICE that, on December 9, 2020, Platte River Midstream, LLC ("PRM") and DJ South Gathering, LLC ("DJ South") (together, the "Companies"), creditors and parties-in-interest in the above-captioned cases (the "Chapter 11 Cases") of the above-captioned debtors and debtors in possession (collectively, the "Debtors" or the "Plaintiffs") and defendants in the above-captioned adversary proceeding brought by the Debtors, filed under seal *Platte River*

[1] The Debtors in the 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.

Midstream, LLC and DJ South Gathering, LLC's Response in Opposition to Extraction Oil & Gas, Inc.'s Motion for Summary Judgment on Counterclaims [A. D.I. 86] (the "Response").

PLEASE TAKE FURTHER NOTICE that, pursuant to paragraph 16 of Exhibit A to the *Order Approving Agreed Confidentiality Stipulation and Protective Order* [D.I. 809] (the "Protective Order"), entered in the Chapter 11 Cases on October 9, 2020, the Companies hereby file the attached proposed redacted version of the Response, attached hereto as **Exhibit 1**.

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Dated: December 14, 2020
Wilmington, Delaware

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EXHIBIT 1

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)
EXTRACTION OIL & GAS, INC.,	
Plaintiff,	Adversary Proceeding
PLATTE RIVER MIDSTREAM, LLC AND DJ SOUTH GATHERING, LLC	Adv. Proc. No. 20-50833 (CSS)
Defendants.	**RE: A. D.I. 79 & 80**

PLATTE RIVER MIDSTREAM, LLC AND DJ SOUTH GATHERING, LLC'S RESPONSE IN OPPOSITION TO EXTRACTION OIL & GAS, INC.'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIMS

[1] The Debtors in the 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Platte River Midstream, LLC ("PRM") and DJ South Gathering, LLC ("DJ South") (together, the "Companies") hereby submit this Response in Opposition to Extraction Oil & Gas, Inc.'s ("Extraction's") Motion for Summary Judgment on Counterclaims [A. D.I. 80] (the "Motion").

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Companies and Extraction are parties to two long-term contracts, pursuant to which the Companies have built, installed, and operated two underground crude oil pipeline systems. These systems were custom built to transport Extraction's crude oil produced from its wells located in several Colorado counties.

The Companies were created to build and operate the transportation systems for Extraction. Indeed, Extraction's affiliates owned interests in the Companies as joint ventures.

The Companies invested hundreds of millions of dollars in obtaining permits, securing real property interests, installing underground pipelines, and otherwise ensuring that Extraction can transport its current and future production by pipeline in urban areas north of Denver. In return, Extraction dedicated all of its crude oil interests within certain defined areas, whether produced or in the ground, to be delivered into the Companies' pipelines for the durations of the agreements. Without the dedications, the pipelines would not have been built.

On August 11, 2020, Extraction filed the *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* [D.I. 412] (the "Rejection Motion"). After determining that the Companies' transportation contracts did not contain covenants running with the land, the Court authorized rejection of the transportation

contracts *nunc pro tunc* from August 11, 2020. *See Findings of Fact and Conclusions of Law* [A. D.I. 54]; *Bench Ruling* [D.I. 942]; *Order* [D.I. 1038].[2]

Extraction seeks summary judgment on the Companies' counterclaims on the basis that rejection of the transportation contracts has relieved Extraction of "any remaining obligations" under the contracts. Mot. at 2. Extraction argues that summary judgment is appropriate because the Companies' counterclaims concern "Extraction's ongoing performance obligations" under the transportation contracts. *Id.* at 7. Extraction is wrong on both counts, and summary judgment should be denied for several reasons:

First, the *Bench Ruling* [D.I. 942] and *Order* [D.I. 1038] do not impact Extraction's pre-rejection breaches under the transportation contracts. As the Court stated in the *Bench Ruling*, rejection only relieves the Debtors of their *future* obligations. *Bench Ruling* [D.I. 942] at 15. Thus, summary judgment is inappropriate as to Extraction's pre-rejection breaches of the transportation contracts.

Second, under *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019), rejection is not rescission—it is merely a breach—and does not allow a debtor to recapture rights that it has already conferred upon the nondebtor party under the contract. Summary judgment therefore should be denied because rejection did not rescind or revoke the dedications, which Extraction conferred to the Companies when it executed the contacts. *See* Mot. at 2 (acknowledging that "previously conferred rights are not rescinded" by rejection) (quoting *Bench Ruling* [D.I. 942] at 15).[3] Upon rejection, the Companies have the option under state law to retain

[2] The Companies have appealed this Court's *Findings of Fact and Conclusions of Law* [A. D.I. 54], *Bench Ruling* [D.I. 942], and *Order* [D.I. 1038] to the U.S. District Court for the District of Delaware. *See Notice of Appeal* [A. D.I. 64]; *Notice of Appeal* [D.I. 1084].

[3] The Companies acknowledge that the Court has ruled on this issue in its *Bench Ruling*. Notwithstanding, as this issue is presently on appeal, this response addresses these arguments to preserve them for appeal.

their rights (the dedications) under the transportation contracts or to terminate the contracts. The Companies have elected to retain their rights under the transportation contracts—including the dedications—resulting in a contractual right that the Companies are entitled to enforce post-rejection.

Third, the Companies' counterclaims concern Extraction's previously conferred rights, namely, Extraction's dedication of interests to the Companies' pipelines. Extraction made these dedications at the time the parties' executed the contracts. Rejection, therefore, does not affect the dedications, which remain enforceable. *See In re Taylor-Wharton Int'l LLC*, 2010 WL 4862723, at *4 (Bankr. D. Del. Nov. 23, 2010). Because the Companies' counterclaims are based on these dedications, and the rights conferred to the Companies that survive rejection, summary judgment should be denied.

STATEMENT OF FACTS

Extraction's statement of facts relies only on its interpretation of the Bankruptcy Code and relevant case law. See Mot. at 2-4. Its interpretation is argument, not evidence. *See Finjan, Inc. v. Symantec Corp.*, 2013 WL 5302560, at *25 (D. Del. Sept. 19, 2013) ("It is well established that attorney argument does not constitute evidence.") (citations omitted). Its interpretation also is incomplete and inaccurate. The relevant contractual terms, and the relevant facts, are presented below.

The Companies and In-Field Transportation Systems

ARB Midstream, LLC ("ARB") is the manager and majority owner of the Companies. *See* Declaration of Rogan McGillis, attached as Exhibit A at ¶¶ 10, 15. ARB builds and operates pipeline systems to transport oil and other liquid hydrocarbons. *See id.* at ¶ 4. These are known as "in-field systems," because they transport oil within the specific production area, as opposed to larger pipelines that transport production over long distances. *See id*.

In-field systems require a substantial upfront financial investment, because the pipelines must be installed before they can deliver production. *See id.* at ¶¶ 5-6. To justify the upfront investment, transportation companies commonly require producers to dedicate their acreage to the pipelines for the term of the agreement. *See id.* at ¶¶ 7-8. The language of a dedication can vary, but the intent is the same: to ensure the producer delivers production into the pipelines so the transportation company recovers the cost of installing an in-field system. *See id.* at ¶ 9. Without the dedication, which binds the producer and its successors, in-field systems would not obtain financing and could not be economically built. *See id.*

The Parties' Contracts and Relevant Lands

PRM and Extraction are parties to a First Amended and Restated Transportation Agreement dated April 14, 2017 (the "PRM TSA"). *See* PRM TSA, attached as Exhibit B.

DJ South and Extraction are parties to a Transportation Services Agreement dated May 16, 2018 (the "DJ South TSA"). *See* DJ South TSA, attached as Exhibit C. The PRM TSA and the DJ South TSA are referred to collectively as the "TSAs."

Upon executing the TSAs, Extraction conferred upon the Companies the exclusive right to transport all crude oil produced from its wells in certain geographically defined areas on the Companies' transportation systems (the "Transportation Systems").

Specifically, pursuant to the PRM TSA, Extraction [redacted] to PRM [redacted] defined as [redacted] in crude oil [redacted] Exhibit B at §§ 1.1(bb), 2.1. The [redacted] in turn, is defined to include certain locations in Larimer and Weld Counties, Colorado. *Id.* at §

1.1(t). These locations, and Extraction's dedication of the crude oil produced from these locations, are referred to herein as the "PRM Dedication Area."

Similarly, pursuant to the DJ South TSA, Extraction [redacted] to DJ South [redacted] defined as [redacted] in crude oil [redacted] Exhibit C at §§ 1.1(dd), 2.1, 2.4. The Dedication Area, in turn, is defined to include certain locations in the City and County of Broomfield, Colorado, and Adams, Arapahoe, Boulder, and Weld Counties, Colorado. *Id.* at § 1.1(u). These locations, and Extraction's dedication of the crude oil produced from these locations, are referred to herein as the "DJ South Dedication Area." The PRM Dedication Area and the DJ South Dedication Area are referred to collectively as the "Dedication Areas."

Under the TSAs, unless expressly stated otherwise, Extraction expressly committed to deliver all of its crude oil produced within the Dedication Areas to the Companies for transportation on the Transportation Systems. *See* Exhibit B at § 2.1; Exhibit C at §§ 2.1, 2.4. Extraction conferred this contractual delivery right to the Companies at the time the TSAs were executed. Exhibit B at § 2.1; Exhibit C at §§ 2.1, 2.4.

Extraction also agreed to a minimum volume commitment, whereby Extraction agreed to [redacted] a specified volume of crude oil into the Transportation Systems. *See* Exhibit B at §§ 1.1(o), 3.1; Exhibit C at §§ 1.1(p), 4.1. Additionally, Extraction agreed to make fixed monthly payments to the Companies, regardless of the of the volumes it delivers. *See* Exhibit B at § 6.1; Exhibit C at § 7.1.

The DJ South Transportation System and Badger Central Gathering Facility

The DJ South TSA contains specific provisions relating to Extraction's wells, along with production from those wells, served by a particular facility owned and operated by Elevation Midstream, LLC ("Elevation"), known as the Badger Central Gathering Facility (the "Badger CGF"). *See* Exhibit C at § 1.1(g).

When the DJ South TSA was executed in May 2018, Elevation had not yet completed the construction of the Badger CGF. The DJ South TSA therefore provided that DJ South [redacted] all production within the DJ South Dedication Area that would be [redacted] *Id.* at § 2.1. The Badger Commencement Date is defined as [redacted] Extraction's crude oil production and redelivering the production into the DJ South Transportation System. *Id.* at § 1.1(h). The DJ South TSA confers no discretion to Extraction as to whether it connects its wells to the Badger CGF, nor does it allow Extraction to avoid its dedication requirements by avoiding connecting its wells to the Badger CGF after the Badger Commencement Date. *See generally id.*

The Badger CGF became operationally capable of receiving Extraction's crude oil production, and redelivering the production into the DJ South Transportation System, on October 11, 2019. *See* Exhibit A at ¶ 18.

On or about December 6, 2019, DJ South learned that Extraction was using tanker trucks to transport crude oil produced from well pads known as the Rinn Valley East and Rinn Valley West (the "Rinn Valley Wells"), which are located within the DJ South Dedication Area and would be served by the Badger CGF after the Badger Commencement Date. *See id.* at ¶ 19.

Extraction's Diversion of Crude Oil

On August 28, 2020, before the ruling on Extraction's Rejection Motion, Extraction verbally notified the Companies that Extraction intended to begin diverting its production away from the Transportation Systems beginning on September 1, 2020. *See id.* at ¶ 22. Extraction stated that it would continue to ramp up the amount of its production that it would transport by truck two-to-three times the initial amount by October 2020. *See id*.

Extraction has confirmed that it began diverting production from the PRM Transportation System effective September 1, 2020, and is continuing to do so by using tanker trucks and a third party's pipeline. *See id.* at ¶ 26.

LEGAL STANDARD

Summary judgment is inappropriate unless "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *In re Maxus Energy Corp.*, 615 B.R. 62, 68 (Bankr. D. Del. 2020) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Extraction "bears the burden of establishing that no genuine issue of material fact exists." *In re Quintus Corp.*, 397 B.R. 710, 714 (Bankr. D. Del. 2008) (citation omitted). The Companies' evidence is accepted as true, and all reasonable inferences are drawn in the Companies' favor and against summary judgment. *See In re LTC Holdings, Inc.*, 597 B.R. 554, 559 (Bankr. D. Del. 2019) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

ARGUMENT

I. Extraction Ignores that the Counterclaims Involve Extraction's Pre-Rejection Breaches.

Extraction's Motion ignores that Extraction's rejection of the TSA's impacts only Extraction's post-rejection obligations. *See Bench Ruling* [D.I. 942] at 15 ("[R]ejection relieves

the Debtors of their *future* obligations") (emphasis added). Any breach by Extraction pre-rejection is unaffected by the Order. Here, Extraction has been in breach of the DJ South TSA for failure to deliver oil from the Rinn Valley Wells into the DJ South Transportation System since at least June 14, 2020. As the DJ South TSA was rejected effective August 11, 2020, a declaration that Extraction was required to deliver all oil produced within the DJ South Dedication Area, including from the Rinn Valley Wells, remains a live controversy and effects liability for any claims, including post-petition administrative claims. Thus, summary judgment on these claims is inappropriate.

II. Extraction Has Not Satisfied the Companies' Rejection Damages Claims and, thus, the Dedication Remains in Force.

In the *Bench Ruling*, the Court held that rejection is only a breach and "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." *See id.* at 17-18. As of the date of the filing of this response, the Companies have not received any claim from the Debtors and certainly no distribution on account of those claims. Thus, under the *Bench Ruling*, until such time as the Companies have received a distribution on account of their claims, the dedications remain in force for that reason alone.

III. The Dedications Conferred by Extraction to the Companies Remain Enforceable Even After Satisfaction of the Companies' Rejection Damages Claims.

Extraction's Motion is premised on the assumption that rejection of the TSAs relieves Extraction of "*any* performance obligations" under the TSAs. Mot. at 6 (emphasis added). Under the Supreme Court's recent *Mission Product* holding, Extraction's assumption is incorrect.

In *Mission Product*, the Supreme Court held that rejection is not a rescission—it is merely a breach—and does not allow a debtor to recapture rights that it has already conferred upon the nondebtor party under the contract. 139 S. Ct. at 1661-62. Based on a plain application of *Mission*

Product, Extraction's Motion should be denied, because rejection of the TSAs did not rescind or revoke the dedications conferred by Extraction to the Companies when executing the TSAs. *See id.* at 1666 (holding rejection "cannot rescind rights that the contract previously granted"). As the Companies have elected to retain their rights under the TSAs post-rejection, they are entitled to enforce those contractual rights previously conferred to them by Extraction, including the dedications. Both of the Companies' counterclaims directly implicate these dedications.

Contrary to Extraction's argument, rejection does not operate to rescind the TSAs, such that Extraction is relieved of "*any*" obligations under the TSAs. Mot. at 6 (emphasis added). Rather, once a debtor rejects a contract in bankruptcy, "[t]he debtor can stop performing its *remaining* obligations under the agreement. But the debtor *cannot rescind the [the rights] already conveyed*." *Id.* at 1662-63 (emphasis added). Accordingly, even after rejection, Extraction is not relieved of the dedications, which were conferred to the Companies upon execution of the TSAs. Rather, Extraction is only relieved for any *future* performance obligations, specifically, Extraction's minimum volume commitment and fixed monthly payment obligations. *See* Exhibit B at §§ 3.1, 6.1; Exhibit C at §§ 4.1, 7.1.

In *Mission Product*, the Supreme Court clarified the effect of rejection. There, the Court held, "rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach … remain in place." *Id.* at 1657–58.

"Breach" is not a defined bankruptcy term, and "means in the [Bankruptcy] Code what it means in contract law outside of bankruptcy." *Id.* at 1661 (citation omitted). When a contract is breached outside of bankruptcy, the non-breaching party has a choice: it can retain its rights under the contract while suing for damages or it can call the whole deal off, terminating the contract. *See id.* at 1662. The breaching party "has no ability, based on its own breach, to terminate the

agreement." *Id.* The same result is true in bankruptcy. *Id.* If the debtor rejects a contract, "the debtor and counterparty do not go back to their pre-contract positions. Instead, *the counterparty retains the rights it has received under the agreement.* As after a breach, so too after a rejection, *those rights survive*." *Id.* (emphasis added).

The rule that the non-debtor's "contractual rights survive rejection" applies to all contractual rights, not merely real property interests. *See id.* at 1661-64 ("Rejection of a contract—*any contract*—in bankruptcy operates not as a rescission but as a breach") (emphasis added). In fact, the contract at issue in *Mission Product*—a trademark license—did not convey any interest in property. *Id.* at 1657 ("The question is whether the debtor-licensor's rejection of that contract deprives the licensee of its rights to use the trademark."); *see also* 1 Pat. L. Fundamentals § 5:71 (2d ed.) ("A trademark license, like a patent license, does not involve a transfer of any property interest in the intangible intellectual property, but rather is only a promise not to sue for what but for the license would be an infringement.").

As with the license at issue in *Mission Product*, the TSAs granted the Companies rights in all of Extraction's oil [redacted] the Dedication Areas. Exhibit B at §§ 1.1(bb), 2.1; Exhibit C at §§ 1.1(dd), 2.1, 2.4. Accordingly, the dedications function as a limit on Extraction's property. Prior to conferring the dedications to the Companies, Extraction was free to transport its oil within the Dedication Areas by any means. Once Extraction entered into the TSAs, it limited its ability to transport oil from the Dedications Areas to one means: the Companies' Transportation Systems. Accordingly, the Companies' rights to Extraction's oil within the Dedication Areas—like the licensee's rights in the license—are not eliminated by rejection and the Companies may continue to enforce those dedication rights, even after rejection. *See Mission Product*, 139 S. Ct. at 1665-66.

The point is further illustrated by *In re Avianca Holdings S.A.*, 2020 WL 5260572 (Bankr. S.D.N.Y. Sept. 4, 2020). There, an airline-debtor rejected a series of credit card processing agreements under which the debtor had agreed to (i) sell the right to future credit card processing agreements it had with two merchant banks; and (ii) if it entered into additional credit card processing agreements with new banks, it would sell its rights in those receivables to the non-debtor. *See id.* at *16-17. Applying *Mission Product*, the bankruptcy court held that only the second obligation—which constituted an unperformed contractual promise—could be relieved through rejection. *See id.* at *17. The first obligation, which required the debtor to deliver credit card receivables under the existing credit card processing agreements, was not affected by rejection. *See id.* at *17 ("The result of rejection here is not a recession [sic] of the [agreements] and rejection does not allow the Debtors to take back the Contract Rights … that the Debtors sold" pre-petition).

As in *Mission Product* and *Avianca*, rejection of the TSAs relieves Extraction only of its unperformed contractual obligations, namely its minimum volume commitments and fixed monthly payment obligations. *See* Exhibit B at §§ 3.1, 6.1; Exhibit C at §§ 4.1, 7.1. But as in *Mission Product* and *Avianca*, rejection of the TSAs is not a rescission of the agreements and does not allow Extraction to take back the dedications that were granted to the Companies upon execution of the TSAs. *See Mission Product*, 139 S. Ct. at 1663 (preservation of previously conferred rights "reflects a general bankruptcy rule: The estate cannot possess anything more than the debtor itself did outside bankruptcy") (citations omitted); *Avianca*, 2020 WL 5260572 at *17; *see also Bench Ruling* [D.I. 942], at 15 ("[R]ejection relieves the Debtors of their future obligations and only previously conferred rights are not rescinded.") (citing *Mission Product*, 139 S. Ct. at 1666).

Extraction's reliance on *Sharon Steel Corp. v. National Fuel Gas Distribution Corp.*, 872 F.2d 36 (3d Cir. 1989), a pre-*Mission Product* case, is misplaced. There, the court affirmed the debtors' rejection of a contract for the sale of natural gas and held that rejection relieved the debtor of its obligations under the contract to accept and pay for the creditor's gas. *Id.* at 40. The contract at issue contained *only* future performance obligations, as opposed to any rights previously conferred on the creditor, as in *Mission Product* and *Avianca*. *See Sharon Steel Corp.*, 872 F.2d at 39 ("The agreement is characterized by reciprocal obligations continuing into the future: [creditor] has promised to provide natural gas to [debtor], and [debtor] has promised to purchase the gas at a certain price …"). As in *Sharon Steel*, Extraction's rejection of the TSAs relieves Extraction of its unperformed contractual obligations—its minimum volume commitments and fixed monthly payment obligations. 872 F.2d at 40 (stating debtor's rejection of the service agreement relieved debtor from its obligation to purchase the creditor's gas); *see also* Exhibit B at §§ 3.1, 6.1; Exhibit C at §§ 4.1, 7.1. However, unlike *Sharon Steel*, the TSAs contain not only future performance obligations, but rights that were conferred by Extraction to the Companies upon execution of the TSAs—the dedications. *See* Exhibit B at § 2.1; Exhibit C at §§ 2.1, 2.4. Rejection does not permit Extraction to rescind its dedication of interests to the Transportation Systems. *See Mission Product*, 139 S. Ct. at 1662.

Similarly, *In re Taylor-Wharton International LLC*, 2010 WL 4862723 (Bankr. D. Del. Nov. 23, 2010), only highlights that the dedication provisions remain enforceable post-rejection. There, debtors entered into a purchase agreement pre-petition whereby they assumed all liability relating to accidents occurring after the purchase agreement's closing date. *See id.* at *1. The bankruptcy court authorized rejection of the purchase agreement and debtors argued that rejection excused the debtors from their obligations under the assumption of liability provisions. *See id.* at

*2. Rejecting the debtors' argument, the bankruptcy court held that the purchase agreement's assumption of liability provisions were "not among the executory provisions" of the purchase agreement. *Id.* at *3. The court explained, "[u]pon closing, [debtor's] assumption of such liabilities was complete and it owed no ongoing obligations to [creditor] as to this aspect of the Purchase Agreement." *Id.* As in *Taylor-Wharton*, Extraction's dedication of all of its oil [redacted] to the Dedication Areas to the Companies was complete upon execution of the TSAs. *See* Exhibit B at §§ 1.1(bb), 2.1; Exhibit C at §§ 1.1(dd), 2.1, 2.4. Consequently, Extraction's "rejection has no effect on such performance." *Taylor-Wharton*, 2010 WL 4862723, at *3.

Extraction uses its Motion as an end-run around the Supreme Court's holding in *Mission Product* to argue that the Companies' counterclaims are mooted by rejection. Not so. Contrary to Extraction's arguments, the Companies' counterclaims do not seek declarations concerning Extraction's "ongoing performance obligations." Mot. at 7. Rather, the Companies' counterclaims seek declarations that Extraction cannot divert oil subject to the TSAs' dedications. *See Answer to Complaint and Counterclaim* [A. D.I. 24] at 8-15. The Companies' counterclaims do not seek any sort of specific performance remedy that would amount to a future performance obligation by Extraction. *See generally id.*

The Companies' first counterclaim seeks a declaration that Extraction remains obligated to adhere to the dedication provisions of the TSAs. *See id.* at 15. Extraction has been relieved of its minimum volume commitments and fixed monthly payment obligations because of rejection. *See Mission Product*, 139 S. Ct. at 1662 (holding rejection permits a debtor to "stop performing its remaining obligations" but noting "the debtor cannot rescind the [rights] already conveyed"); *Sharon Steel*, 872 F.2d at 40 (rejection relieved debtor of future performance obligations).

Extraction, however, has not been relieved of rights previously conferred to the Companies, namely, the dedications. *See Mission Product*, 139 S. Ct. at 1662 (debtor cannot rescind contractual rights previously conveyed). Extraction's dedication of all of its oil within the Dedication Areas to the Transportation Systems was complete upon execution of the TSAs and enforceability of the dedication provisions "is not affected by [Extraction's] rejection" of the TSAs. *Taylor-Wharton*, 2010 WL 4862723, at *4. Accordingly, although Extraction is not required to produce any oil from the Dedication Areas, or make any future payments to the Companies, if Extraction produces oil within the Dedication Areas, it must deliver that oil into the Transportation Systems. Accordingly, the Companies' counterclaim does not affect Extraction's future performance. Rather, it seeks to enforce a right previously conferred to the Companies.

Similarly, the Companies' second counterclaim seeks a declaration that Extraction remains obligated to adhere to the DJ South TSA's dedication provisions with respect to the Rinn Valley Wells. *See Answer to Complaint and Counterclaim* [A. D.I. 24] at 15-16. The DJ South TSA dedicates and commits all crude oil produced within the DJ South Dedication Area and that would be served by the Badger CGF after the Badger Commencement Date. *See* Exhibit C at § 2.1. The Badger Commencement Date is defined as [redacted] Extraction's crude oil production and redelivering the production into the DJ South Transportation System. *Id.* at § 1.1(h). The DJ South TSA confers no discretion to Extraction as to whether it connects its wells to the Badger CGF, nor does it allow Extraction to avoid its dedication requirements by avoiding connecting its wells to the Badger CGF after the Badger Commencement Date. *See generally id.*

The Badger CGF became operationally capable of receiving Extraction's crude oil production, and redelivering the production into the DJ South Transportation System, on October 11, 2019. *See* Exhibit A at ¶ 18. Despite becoming operationally capable of receiving Extraction's crude oil production, and redelivering the production into the DJ South Transportation System in October of 2019, Extraction failed to connect the Rinn Valley wellpads to the Badger CGF and instead, began transporting oil produced from the Rinn Valley Wells by tanker truck. *See id.* at ¶¶ 18-19. Accordingly, the counterclaim seeks a declaration that Extraction is not entitled to transport oil from the Rinn Valley Wells by tanker truck because that oil is dedicated and committed to the DJ South Transportation System. *See Answer to Complaint and Counterclaim* [A. D.I. 24] at 15-16.

As stated above, rejection has relieved Extraction of its minimum volume commitment and fixed monthly payment obligations under the DJ South TSA. *See Mission Product*, 139 S. Ct. at 1662; *Sharon Steel*, 872 F.2d at 40. Rejection, however, did not discharge rights previously conferred to DJ South, namely the dedication of all crude oil produced within the DJ South Dedication Area and that would be served by the Badger CGF after the Badger Commencement Date. *See Mission Product*, 139 S. Ct. at 1662 (debtor cannot rescind contractual rights previously conveyed); *Taylor-Wharton*, 2010 WL 4862723, at *3 ("[R]ejection does not undo past performance under the contract."). This is because Extraction's performance under the DJ South TSA's dedication provision was complete upon execution of the DJ South TSA, and DJ South's ability to enforce the dedication provision is not affected by Extraction's rejection of the DJ South TSA. *Taylor-Wharton*, 2010 WL 4862723, at *4.

Thus, although Extraction is not required to produce any oil from the DJ South Dedication Area, or make any future payments to DJ South, if Extraction produces oil within the DJ South

Dedication Area, including from the Rinn Valley Wells, Extraction must deliver that oil into the DJ South Transportation System and cannot transport that oil by tanker truck. Accordingly, the Companies' counterclaim does not affect Extraction's future performance. Rather, it seeks to enforce a right previously conferred to DJ South.

CONCLUSION

For the reasons set forth above, Extraction's Motion should be denied.

Dated: December 9, 2020
Wilmington, Delaware

/s/ Brett S. Turlington

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: EXTRACTION OIL & GAS, INC., *et al.*,[1] Debtors.	Chapter 11 Case No. 20-11548 (CSS) (Jointly Administered)
EXTRACTION OIL & GAS, INC., Plaintiff, v. PLATTE RIVER MIDSTREAM, LLC AND DJ SOUTH GATHERING, LLC Defendants.	Adv. Proc. No. 20-50833 (CSS)

DECLARATION OF ROGAN MCGILLIS

Pursuant to 28 U.S.C. § 1746, I, Rogan McGillis, declare under penalty of perjury as follows:

1. Since 2014, I have served as the Chief Financial Officer of ARB Midstream, LLC ("ARB"). ARB is a private oil and gas liquids midstream and marketing / logistics solutions company. I am a co-founder of ARB and member of the ARB's Board of Directors. Given my roles at ARB, I have supervisory responsibility over all financial aspects of ARB and its assets.

2. For the past 10 years, I have been involved in negotiating and developing crude oil or other liquid hydrocarbon pipeline transportation projects. I am familiar with the financial

[1] The Debtors in the 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.

and operational terms contained in these contracts, as well as the financial structures of transportation companies like ARB. In particular, I am familiar with the requirements needed to obtain equity and debt financing for transportation systems, and the general expectations of transportation companies on recovering capital investments and a return on those investments.

3. Based on my expertise and responsibilities at ARB, I have personal knowledge of the contract negotiations, pipeline operations, and discussions with Extraction discussed below.

ARB Midstream

4. ARB builds and operates pipeline systems to transport crude oil and other liquid hydrocarbons produced from wells throughout North America. The pipeline systems owned and operated by ARB are known as "in-field transportation systems" because they transport oil within a specific production area. In-field systems are different from large pipelines that transport production over long distances, often across interstate lines.

5. In-field gathering systems can require dozens, even hundreds, of miles of pipelines. ARB does not purchase the property necessary to install the pipeline. Instead, like most midstream transportation companies, ARB negotiates and purchases rights of ways or easements from property owners (including both producers and individual landowners) in order to install its underground pipelines. ARB also is required to obtain permits from local and state governments to build pipelines under each road, river, and ditch crossing, as well as additional permits for the construction of the pipeline and facilities themselves.

6. The process of acquiring rights of ways, easements, permits, installing the pipelines and related facilities, and operating an in-field transportation system costs millions, potentially hundreds of millions, of dollars. Building an in-field transportation system therefore requires a similar multi-million-dollar commitment. The capital investment, and any return on

that investment, are not recovered until many years later. This has been my experience with every transportation system that ARB has operated, and is no different than any transportation system in the industry.

7. To secure its investment in a transportation system, ARB seeks to obtain both dedications from at least one shipper, as well as additional minimum financial commitments, if possible, from shippers. A dedication means that the shipper has dedicated all of its interests in current and future oil production to be transported on the company's pipeline system for a contractually defined term, or even the life of the underlying oil and gas leases. A minimum financial commitment means that the shipper has committed a minimum monthly, or annual, amount of revenue to ARB regardless of whether the shipper actually ships any oil in that corresponding period.

8. The dedication of the oil is the most valuable long-term component of an in-field gathering contract. This is because, in the oil and gas industry, I understand, and ARB understands, that a dedication is a binding commitment that applies to a shipper's successors, and cannot be terminated except as permitted by the parties' agreement. Otherwise, ARB and any midstream company would be unable to obtain the investment capital needed to install a crude oil transportation pipeline and a producer would, therefore, not be able to produce oil from its mineral interests if it had no means of safely and economically transporting the oil over the long distances that our pipelines facilitate. This is based on my experience in the industry, and my knowledge of the risks evaluated by investors over the course of my 10 years of negotiating and evaluating pipeline transportation projects.

9. In my experience, and based on my knowledge of ARB's contracts and the contracts of other midstream providers, dedications are common in the in-field gathering

industry. I have seen dedications worded in different ways depending on the contract, but the purpose is to ensure the producer is obligated to deliver its current and future production into the pipeline so the transportation company can recover the cost of installing the pipeline system. Absent a commitment of both current and future production, transportation systems simply would not be able to obtain financing and would not be built.

The PRM Transportation System

10. In September 2016, ARB acquired the predecessor entity to Platte River Midstream, LLC ("PRM") to build and operate a crude oil transportation system in Larimer and Weld Counties, Colorado. When PRM acquired the system, Rimrock had a transportation contract in place with Bayswater Exploration & Production, LLC ("Bayswater"), a producer in the DJ Basin.

11. The following year, Extraction Oil & Gas, Inc. ("Extraction") acquired Bayswater's wells, and thus was the successor to Bayswater's transportation contract with PRM.

12. In late 2016, Extraction began negotiating with ARB to expand PRM's transportation system, so that it would connect to other wells Extraction operated, and intended to drill and operate, in Larimer and Weld Counties, Colorado. I was personally involved in these negotiations, as was ARB's Chief Executive Officer at the time, Adam Bedard.

13. Accordingly, on April 14, 2017, PRM and Extraction entered into a First Amended and Restated Transportation Agreement (the "PRM TSA"). Pursuant to the PRM TSA, PRM agreed to undertake the expense and effort of constructing, installing, and operating an extensive network of pipelines and related facilities (the "PRM Transportation System"). Extraction, in turn, agreed to dedicate and commit all of its interests in crude oil in, under, and attributable to certain locations in Larimer and Weld Counties to the PRM Transportation System (the "PRM Dedication Area").

The DJ South Transportation System and Badger Central Gathering Facility

14. In October 2017, Extraction began negotiating with ARB to build a new in-field gathering system that would transport Extraction's crude oil production from wells located in the City and County of Broomfield, Colorado, and Adams, Arapahoe, Boulder, and Weld Counties, Colorado. I was personally involved in these negotiations, as was ARB's Chief Executive Officer at the time, Adam Bedard.

15. Accordingly, on January 17, 2018, ARB formed a limited liability company, DJ South Gathering, LLC ("DJ South") as a wholly owned subsidiary of PRH to build and operate the new transportation system (the "DJ South Transportation System"). ARB is the manager of DJ South.

16. On May 16, 2018, DJ South and Extraction entered into a Transportation Services Agreement (the "DJ South TSA"). The PRM TSA and the DJ South TSA are referred to together as the "TSAs." Pursuant to the DJ South TSA, DJ South agreed to undertake the expense and effort of constructing, installing, and operating the DJ South Transportation System. Extraction, in turn, agreed to dedicate and commit all of its interests in crude oil in, under, and attributable to certain locations in the City and County of Broomfield, Colorado, and Adams, Arapahoe, Boulder, and Weld Counties, Colorado to the DJ South Transportation System (the "DJ South Dedication Area").

17. The DJ South Transportation System connects to two downstream central gathering facilities ("CGFs") that collect production from multiple wells, the Badger Central Gathering Facility (the "Badger CGF") and the Matador Central Gathering Facility (the "Matador CGF"). The CGFs are owned and operated by Elevation Midstream, LLC ("Elevation"). At the time the DJ South TSA was signed, Elevation had not yet completed

construction of either of the CGFs. Accordingly, the parties agreed that DJ South would temporarily release all production within the DJ South Dedication Area that would be served by the CGFs until the "Badger Commencement Date" and the "Matador Commencement Date," defined as the date upon with the CGFs became operationally capable of receiving Extraction's volumes and redelivering those volumes to the DJ South Transportation System. To date, Extraction has only drilled wells connecting to the Badger CGF.

18. The Badger CGF became operationally capable of receiving crude oil production and redelivering that production into the DJ South Transportation System, effective October 11, 2019.

19. On December 6, 2019, DJ South learned from Extraction that it was using tanker trucks to transport crude oil produced from well pads known as the Rinn Valley East and Rinn Valley West (the "Rinn Valley Wells"), which are located within the DJ South Dedication Area. As with any new wells developed by Extraction within the DJ South Dedication Area, it was ARB's understanding that the Rinn Valley Wells would be served by the Badger CGF after the Badger Commencement Date.

Extraction's Diversion of Crude Oil from the PRM Transportation System

20. In connection with the bankruptcy proceedings, I understand that the Court's Order of November 11, 2020 rejected the TSAs as of August 11, 2020 (the "Rejection Order").

21. For several months prior to the Court's Rejection Order, I was involved in negotiations with Extraction concerning the TSAs. [redacted]

22. On August 28, 2020, ARB received a telephone call from an employee of Extraction, Landon Jacobson. Mr. Jacobson informed ARB that, beginning on September 1, 2020, Extraction would use tanker trucks to transport production from the Platte River Dedication Area, rather than using the PRM Transportation System. Mr. Jacobson advised that Extraction would begin shipping certain volumes by tanker truck in September, and two to three times more volumes in October.

23. On August 31, 2020, ARB received an e-mail from Extraction's CEO, Matt Owens. In that e-mail, Mr. Owens referenced the parties' negotiations concerning the TSAs described above. He advised that Extraction was [redacted] hat the PRM TSA [redacted] He further stated that, [redacted] Mr. Owens claimed that [redacted] He informed ARB that, [redacted] Mr. Owens stated, [redacted]

24. Mr. Owens further stated in this e-mail that, unless PRM agreed to Extraction's demands, then Extraction [redacted]

25. After receiving Mr. Owens' e-mail, ARB received additional communications from Extraction through Mr. Jacobson. He explained that, on September 1, 2020, Extraction

would stop delivering production from certain wells in Weld County, Colorado, to the PRM Transportation System.

26. Extraction has acknowledged that it began diverting production from the PRM Transportation System effective September 1, 2020 and is continuing to do so by using tank trucks and third party's pipeline.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 8, 2020

Rogan McGilllis
Chief Financial Officer
ARB Midstream, LLC

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EXHIBIT B

FULLY REDACTED

EXHIBIT C

FULLY REDACTED

CERTIFICATE OF SERVICE

I, Brett S. Turlington, certify that I am not less than 18 years of age, and that service of the foregoing *Platte River Midstream, LLC and DJ South Gathering, LLC's Response in Opposition to Extraction Oil & Gas, Inc.'s Motion for Summary Judgment on Counterclaims* was caused to be made on December 9, 2020, in the manner indicated upon the parties identified below.

BY ELECTRONIC MAIL

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Date: December 9, 2020

/s/ Brett S. Turlington
Brett S. Turlington (No. 6705)

CERTIFICATE OF SERVICE

I, Brett S. Turlington, certify that I am not less than 18 years of age, and that service of the foregoing *Notice of Filing of Proposed Redacted Version of Platte River Midstream, LLC and DJ South Gathering, LLC's Response in Opposition to Extraction Oil & Gas, Inc.'s Motion for Summary Judgment on Counterclaims* was caused to be made on December 14, 2020, via CM/ECF upon those parties registered to receive such electronic notifications and served additionally, as indicated, upon the parties identified below.

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