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

| | |
|---|---|
| In re: | ) Chapter 11 |
| | ) Bankruptcy Case No. 20-11548 (CSS) |
| EXTRACTION OIL & GAS, INC., *et al.*,[1] | ) Jointly Administered |
| Debtors. | ) |
| GRAND MESA PIPELINE, LLC, | ) |
| Appellant, | ) |
| v. | ) |
| | ) Civil Action No. 20-cv-01411-CFC |
| EXTRACTION OIL & GAS, INC. | ) Civil Action No. 20-cv-01521-CFC |
| Appellee. | ) Civil Action No. 20-cv-01412-CFC |
| | ) Civil Action No. 20-cv-01506-CFC |
| | ) Civil Action No. 20-cv-01564-CFC |
| FEDERAL ENERGY REGULATORY COMMISSION, | ) |
| Appellant, | ) Bankruptcy Case No. 20-11548 (CSS) |
| | ) Bankruptcy BAP No. 20-43 |
| v. | ) Bankruptcy BAP No. 20-44 |
| | ) Bankruptcy BAP No. 20-52 |
| EXTRACTION OIL & GAS, INC., | ) Bankruptcy BAP No. 20-53 |
| | ) Bankruptcy BAP No. 20-56 |
| Appellee. | ) |
| PLATTE RIVER MIDSTREAM, LLC, *et al.*, | ) |
| Appellant, | ) |
| v. | ) |
| EXTRACTION OIL & GAS, INC. | ) |
| Appellee. | ) |

**APPELLEE EXTRACTION OIL & GAS, INC.'S REPLY IN SUPPORT OF CROSS-MOTION FOR CONSOLIDATION OF BANKRUPTCY APPEALS**

[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.

Pursuant to Local Rule 7.1.2(c) and Federal Rules of Bankruptcy Procedure 8003(b) and 8013(a)(3)(B), Appellee Extraction Oil & Gas, Inc. (Extraction) respectfully submits this reply in support of its cross-motion to consolidate eight appeals pending in this Court that arise from Extraction's bankruptcy. Specifically, this reply responds to the opposition filed by Appellee Grand Mesa Midstream, LLC (Grand Mesa).

As Extraction's cross-motion explains, all eight appeals—including the six appeals filed by Grand Mesa and the Federal Energy Regulatory Commission (FERC)—concern the same ultimate issue: whether the Bankruptcy Court properly authorized the rejection of the Transportation Service Agreements (TSAs) in dispute.[2] FERC has not given any indication that it opposes the consolidation of the eight appeals.[3] Grand Mesa also agrees that five appeals filed by it and FERC warrant consolidation, and it "takes no position" regarding the consolidation of two appeals filed by Platte River Midstream, LLC and DJ South Gathering, LLC (Platte River/DJ South).[4] Opp.3-4 n.2. Grand Mesa does, however, oppose the

[2] On December 19, 2020, Extraction and Grand Mesa reached a settlement agreement that would obviate its appeals, and the Bankruptcy Court approved it on December 21, 2020. *See* D.I.1464. Extraction anticipates that Grand Mesa will soon terminate its appeals in this Court. Until that time, however, the Court should consolidate Grand Mesa's three appeals with the remaining five.

[3] On December 7, 2020, Grand Mesa and FERC filed a joint motion to consolidate their five appeals, leading Extraction to file a response to that joint motion as well as a cross-motion regarding consolidation. But the reply in support of the joint motion, along with the response to the cross-motion, is on behalf of Grand Mesa alone. Extraction construes FERC's recent silence as support for the consolidation of all eight appeals.

[4] Platte River/DJ South filed another appeal on December 21, 2020. *See* D.I.1470. Extraction is still considering whether to seek consolidation of that appeal with the other eight and reserves all rights to seek such relief.

consolidation of one of its appeals—its adversary-proceeding appeal (20-cv-01458)—with the remaining seven. Because Grand Mesa's arguments in support of keeping that one appeal separate from the rest are fatally flawed, the Court should grant Extraction's cross-motion and consolidate all the appeals.

1. Grand Mesa first claims that the adversary-proceeding appeal is "[u]nrelated" to the lift-stay and contract-rejection appeals filed by it and FERC. Opp.3-4. But that position is hard to take seriously considering that, as recently as December 11, 2020, Grand Mesa told this Court that the question "whether the Bankruptcy Court erred in determining the TSAs do not contain covenants running with the land"—*i.e.*, whether the Bankruptcy Court erred in the adversary-proceeding appeal—is "[r]elated[]" to the questions arising from lift-stay and contract-rejection appeals. *See, e.g.*, 20-cv-01411 Dkt.21 at 10-11 & n.5. Grand Mesa cannot have it both ways—and it had the correct view the first time.

2. Indeed, the relatedness of these appeals is confirmed by the fact that the contract-rejection order repeatedly cross-references the Grand Mesa adversary-proceeding order. *See* D.I.942 at 12 ("The Rejection Counterparties [including Grand Mesa] contend that the TSAs contain 'covenants that run with the land' and, thus, cannot be rejected. The Court has previously held on summary judgment in two adversary proceedings brought by [Extraction] against the Rejection Counterparties (at their insistence) that the TSA's do not contain covenants that run

with the land." (footnote omitted)); *see also* D.I.942 at 12 n.32, 18 n.57. Grand Mesa has itself proclaimed that similar cross-references demonstrate relatedness and are sufficient to warrant the consolidation of the lift-stay and contract-rejection appeals. *See* Consolidation.Mot.4. There is no basis for a different rule when it comes to the adversary-proceeding appeal.

3. The only response that Grand Mesa can muster is that the adversary-proceeding appeal addresses an "issue of law"—namely, whether Grand Mesa's TSA contains covenants running with the land under Colorado law—that purportedly "necessitates certification to the Colorado Supreme Court." Opp.4. That claim suffers from severe procedural and substantive problems.

4. To begin, as Extraction has explained, the proper way to ask a federal court to certify a question to a state court is to present such a request in a merits brief *after* consolidation—*i.e.*, at a point in the litigation when the federal court will have the greatest familiarity with the dispute (and the significance of the state-law question at issue), not at the outset of the litigation when the federal court has the least familiarity with the dispute (and the significance of the state-law question at issue). *See* Cross-Mot.10-11. Grand Mesa insists that Extraction's position is mistaken because Colorado's certification rule says that a party must request certification in a "motion." Opp.5. But that response does nothing to undermine Extraction's point, for a party may obviously include a motion in a merits brief—as,

for example, the Third Circuit's certification rule expressly states. *See* 3d Cir. L.A.R. 110.1 ("A motion for certification must be included in the moving party's brief.").

5. Grand Mesa thus shifts to arguing that Extraction improperly "presumes" that the Third Circuit's certification rule applies in this Court. Opp.5. But Extraction never operated on such a presumption. It merely observed that the Third Circuit, which handles such a large quantity of certification requests that it had to reduce its position on the subject to a written rule, has concluded that by far the best way to seek certification is for a party to assert such a request in a merits brief. *See* Cross-Mot.10 n.5. Grand Mesa never offers any reasoning as to why the Third Circuit's considered judgment is incorrect.

6. In any event, it is obvious right now that Grand Mesa stands no chance of obtaining certification, further counseling against keeping its adversary-proceeding appeal separate from the other appeals. The Colorado Supreme Court answers a question certified by a federal court only when "there is no controlling precedent in the decisions of the [Colorado Supreme Court]" on the relevant question and when that question "may be determinative of the cause then pending in the certifying court." Colo. R. App. P. 21.1(a). While Grand Mesa asserts that the covenants issue is "unsettled" as a matter of Colorado law, Opp.5, it tellingly does

not engage with the numerous decisions from the Colorado Supreme Court settling that issue, *see* Cross-Mot.11.

7. More importantly, there is no credible argument that the covenants issue is "determinative" here: as the Bankruptcy Court explained, regardless of what Colorado law says about the covenants issue, Extraction may lawfully reject the TSAs and proceed as a matter of *federal* law anyway. *See* Cross-Mot.11; *see also* D.I.942 at 19 (explaining that the TSAs may "be rejected pursuant to Section 365 of the Bankruptcy Code even if they contain covenants running with the land, which they do not"). Grand Mesa has literally no response to that problem, which confirms that its certification argument is no impediment to the consolidation of all eight appeals.

8. In sum, although Extraction expects that Grand Mesa will soon terminate its appeals given the parties' settlement agreement, Grand Mesa has offered no sound reason to separate its adversary-proceeding appeal from the remaining seven appeals in the meantime. Because all eight of those appeals concern the propriety of contract rejection, the Court should consolidate all eight.

WHEREFORE, Extraction respectfully requests that this Court enter an order consolidating the appeals in Civil Action Nos. 20-cv-01411, 20-cv-01412, 20-cv-01457, 20-cv-01458, 20-cv-01506, 20-cv-01521, 20-cv-01532, and 20-cv-01564, and instructing the parties to propose a single briefing schedule.

Dated: December 28, 2020
Wilmington, Delaware

/s/ *Richard W. Riley*

**WHITEFORD, TAYLOR & PRESTON LLC**[5]
Marc R. Abrams (DE No. 955)
Richard W. Riley (DE No. 4052)
Stephen B. Gerald (DE No. 5857)
The Renaissance Centre
405 North King Street, Suite 500
Wilmington, Delaware 19801
Telephone: (302) 353-4144
Facsimile: (302) 661-7950
Email: mabrams@wtplaw.com
rriley@wtplaw.com
sgerald@wtplaw.com

- and -

**KIRKLAND & ELLIS LLP**
**KIRKLAND & ELLIS INTERNATIONAL LLP**
George W. Hicks, Jr. (*admitted pro hac vice)*
C. Harker Rhodes IV (*admitted pro hac vice)*
Andrew C. Lawrence (*admitted pro hac vice)*
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 389-5000
Email: george.hicks@kirkland.com
harker.rhodes@kirkland.com
andrew.lawrence@kirkland.com

- and-

[5] Whiteford, Taylor & Preston LLC operates as Whiteford Taylor & Preston L.L.P. in jurisdictions outside of Delaware.

Anna Rotman, P.C. (*admitted pro hac vice*)
Jamie Alan Aycock (*admitted pro hac vice*)
Kenneth Young (*admitted pro hac vice*)
609 Main Street
Houston, TX 77002
Telephone: (713) 836-3600
Facsimile: (713) 836-3601
Email: anna.rotman@kirkland.com
jamie.aycock@kirkland.com
kenneth.young@kirkland.com

*Co-Counsel to Appellee Extraction Oil & Gas, Inc.*

**Certificate of Service**

I, Richard W. Riley, certify that on December 28, 2020, I caused an electronic filed copy of the (i) foregoing document using the Court's CM/ECF which reflects that an electronic notification of filing was served on all registered users of the CM/ECF System that have requested such notification; and (ii) a copy to be served overnight delivery on the party listed below.

Daniel Mitchell Vinnik, Esq.
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

*/s/ Richard W. Riley*
Richard W. Riley (DE No. 4053)