

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)

**MOTION TO ABSTAIN FROM CONSIDERING
MOTION TO ASSUME EXECUTORY CONTRACT**

The City and County of Broomfield (“Broomfield”) hereby files its Motion to Abstain from Considering the Motion to Assume Executory Contract (the “Motion”) and in support thereof respectfully represents as follows:

PRELIMINARY STATEMENT

Through its Sixth Amended Plan (the “Plan”) Extraction Oil & Gas Inc. (the “Debtor”) seeks authority to assume that certain Amended Oil and Gas Operator Agreement dated October 24, 2017 (the “Operator Agreement”) between the Debtor and Broomfield. Notwithstanding a provision in the Operator Agreement which requires the Debtor to comply with regulations and laws enacted by Broomfield and a finding from a court of competent jurisdiction that the Debtor is not in compliance with a law enacted by Broomfield, the Debtor represented to the Court that there are no breaches related to the Operator Agreement. In doing so, it appears that the Debtor seeks the exact ruling from this Court – that a noise ordinance enacted by Broomfield in 2020 is inapplicable to the Debtor - that the Debtor failed to achieve in the state trial court, a ruling the Debtor continues to seek through an appeal of the state court’s order and parallel litigation initiated by the Debtor in the United States District Court for the District of Colorado after its loss in state court. However, based on longstanding precedent from the United States Supreme Court, this



Court is required to abstain from considering the Debtor's attempt to inappropriately circumvent the state court ruling.

Alternatively, the Court should deny the assumption request as the Operator Agreement is not an executory contract as that term is defined by Section 365 of the Bankruptcy Code. Specifically, Broomfield has no remaining material obligations to perform under the Operator Agreement.

PROCEDURAL HISTORY

1. The Operator Agreement governs how the Debtor will operate its oil and gas exploration and development activities in Broomfield, Colorado.

2. Section 6 of the Operator Agreement provides:

[Extraction] shall comply 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] reserves 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. The Municipal Court for the City and County of Broomfield (the "Municipal Court") scheduled a hearing on these criminal citations

5. Both before and during the trial, the Debtor asked the Municipal Court to dismiss the criminal citations for numerous reasons, including: (a) the Operator Agreement created vested

rights that could not be affected by the Ordinance; (b) the Ordinance violated the Debtor's equal protection rights; (c) the Ordinance violated the Contracts Clause of the United States Constitution; and (d) the Ordinance violated the Ex Post Facto Clause of the United States Constitution. The Municipal Court denied the rejected the Debtor's arguments for dismissal.

6. On October 7, 2020, after a two (2) day trial in which Broomfield and the Debtor presented evidence and argument, the Municipal Court entered a judgment of conviction against Extraction for its violations of the Ordinance. Extraction appealed its conviction and then 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.

7. On December 4, 2020, the Debtor filed its Plan Supplement that included a list of contracts that the Debtor seeks to assume in connection with the Plan and 11 U.S.C. § 365(b). The Operator Agreement is identified as one of the contracts the Debtor wishes to assume.

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

9. Broomfield has no material obligations remaining to perform under the Operator Agreement.

LEGAL ARGUMENT

A. The Court Must Abstain from Considering the Motion to Assume

10. To promote comity between the national and state governments, federal courts are required to abstain from deciding matters that would interfere with certain ongoing state proceedings. *Malhan v. Secretary U.S. Dept. of State*, 938 F.3d 453, 461 (3d Cir. 2019), *citing Younger v. Harris*, 401 U.S. 37 (1971).

11. The ongoing state proceedings to which *Younger* abstention applies are: (a) ongoing state criminal prosecutions; (b) certain civil enforcement proceedings; and (c) pending civil proceedings involving certain orders uniquely in furtherance of the state court's ability to perform its judicial functions. *Malhan*, 938 F.3d at 462, *citing Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69 (2013).

12. If there is an ongoing state court proceeding that falls into one of the three (3) foregoing categories, then a federal court must abstain from hearing a matter if: (a) the ongoing state court proceedings are judicial in nature; (b) the proceedings implicate important state interests; and (c) the proceedings afford an adequate opportunity to raise federal claims. *Malhan*, 938 F.3d at 462, *citing Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982).

13. The facts of the case before this Court establish all of the requirements for application of the *Younger* abstention doctrine. First, it cannot be questioned that the ongoing state court proceedings between Broomfield and the Debtor in state court constitute ongoing criminal prosecutions which are judicial in nature. Second, an important state interest is implicated as the underlying state court proceedings are an attempt by Broomfield to enforce its criminal laws. *Donahue v. Acosta*, 789 Fed. Appx. 324, 328 (3d Cir. 2019) (*Younger* applies to an underlying criminal case on appeal in the state system). Finally, the Debtor had an adequate opportunity to and did raise its federal claims related to the unenforceability of the Noise Ordinance in the underlying state court proceeding.

14. Based on the foregoing, this Court must abstain from considering the Debtor's request to assume the Operator Agreement.

B. The Operator Agreement is not an Executory Contract

15. Section 365 of the Bankruptcy Code authorizes a debtor to assume executory contracts. An executory contract is “a contract under which the obligation of both the bankruptcy and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.” *In re Southland Royalty Company, LLC*, 623 B.R. 64, 79 (Bankr. D. Del. 2020).

16. Broomfield has no remaining material performance obligations under the Operator Agreement.

17. Therefore, the Operator Agreement is not an executory contract which the Debtor can assume pursuant to 11 U.S.C. § 365.

CONCLUSION

WHEREFORE, Broomfield respectfully requests the Court enter an order abstaining from consideration of the Debtor’s Motion to Assume the Operator Agreement or, in the alternative, determining that the Operator Agreement is not executory, and granting such other and further relief as the Court deems just and proper.

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Dated: March 5, 2021