Docket #0046 Date Filed: 4/2/2021

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)
Reorganized Debtors.	(Jointly Administered)
ANNETTE LEAZER, *et al.*,	
Plaintiffs,	
v.	Adv. Pro. No. 20-50963 (CSS)
	Re: D.I. 24, 37, & 43
EXTRACTION OIL & GAS, INC.,	
Defendant.	

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

[1] The Reorganized Debtors in these chapter 11 cases, along with the last four digits of each Reorganized 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 Reorganized Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

In response to Extraction's factual challenge[2] to subject matter jurisdiction, Plaintiffs do not claim they exhausted their administrative remedies with the Colorado Oil and Gas Commission (the "Commission").[3] Instead, Plaintiffs argue that the requirements of administrative exhaustion do not apply to them, or, alternatively, impugn the capability of the Commission and attempt to speak on its behalf. Plaintiffs' arguments are flawed, and the Court should dismiss this case.

ARGUMENT

I. THIS ADVERSARY PROCEEDING DOES NOT RAISE ISSUES THAT ONLY THE COURT CAN RESOLVE

Contrary to Plaintiffs' assertions,[4] Plaintiffs were required to exhaust their administrative remedies before filing their claims in this adversary proceeding. Plaintiffs misconstrue the few cases they cite for the contrary position and incorrectly argue their claims arise under federal law. There is no legally cognizable reason to overlook Plaintiffs' failure to exhaust their administrative remedies.

A. Bankruptcy Courts Dismiss Adversary Proceedings for Failure to Exhaust Administrative Remedies

Plaintiffs incorrectly suggest that statutory administrative exhaustion does not apply to bankruptcy courts.[5] On the contrary, bankruptcy courts often dismiss adversary proceedings where parties have failed to exhaust their administrative remedies.

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2 Extraction "presents a factual attack upon subject matter jurisdiction, as it argues that this Court lacks jurisdiction over the claims due to [Plaintiffs'] failure to exhaust administrative remedies." *Garnett v. United States*, No. CV 18-2009-LPS, 2019 WL 4393146, at *1 (D. Del. Sept. 13, 2019).

3 *See generally Br. in Opp'n to Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction* [A.D.I. 43] (hereinafter the "Opp'n") (lacking arguments that Plaintiffs exhausted their administrative remedies).

4 *See id.* at 10–11.

5 *See id.* (arguing bankruptcy courts need not concern themselves with administrative exhaustion).

For example, in *In re LymeCare, Inc.*, a bankruptcy court sitting in the Third Circuit dismissed multiple adversary proceeding claims under the administrative-exhaustion doctrine. *See* 301 B.R. 662 (Bankr. D.N.J. 2003). In that case, the plaintiffs filed an adversary proceeding "to collect reimbursement payments from [a defendant], asserting causes of action for breach of contract and for violations of [ERISA]." *Id.* at 666–67. The court first considered the federal cause of action, holding that "plaintiffs may recover . . . only if [Federal Employees Health Benefits Act] requirements are met." *Id.* at 669. The court noted the "doctrine of exhaustion of administrative remedies provides that 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Id.* at 670 (quoting *Kobleur v. Group Hospitalization & Med. Services, Inc.*, 954 F.2d 705, 709 (11th Cir. 1992)). The plaintiffs did not exhaust their administrative remedies. *See id.* at 672–73. Thus, the court dismissed the federal claim. *See id.*

The *LymeCare* court then turned to the state law breach of contract claims and noted the state law "appeal process for [plaintiffs' claims] [was] governed by regulations promulgated by the State Health Benefits Commission," which required presentation of the plaintiffs' claims to that agency before judicial review. *Id.* at 674. The plaintiffs did not present their claims to that agency. *See id.* at 675. Thus, the court applied the state law exhaustion requirement and dismissed the contract claims—even despite the already "especially prolonged" litigation. *Id.* at 677–78.

Other bankruptcy courts dismiss adversary proceedings for the same reasons, and they do so even when the claims involve issues related to the underlying bankruptcy case.[6] Indeed, these

[6] *See, e.g.*, *In re S. Crescent Rehab. & Ret. Cmty., Inc.*, 10-73264-MHM, 2012 WL 1292746, at *1 (Bankr. N.D. Ga. Mar. 30, 2012) (dismissing an adversary proceeding for a turnover action because "the Social Security Act requires exhaustion of administrative remedies before a party may seek judicial review" and "[n]either the complaint nor Plaintiff's response to the motion to dismiss present or allege exhaustion of administrative remedies"); *In re Distad*, AP 07-02047, 2012 WL 12552297, at *1 (Bankr. D. Utah Jan. 25, 2012) (dismissing adversary proceeding claims for violation of a discharge injunction for failure to exhaust administrative remedies).

courts have noted that "exhaustion of all normal administrative remedies" is among the "otherwise-applicable procedural roadblocks" that govern bankruptcy cases. *In re C.F. Foods, L.P.*, 00-451, 2000 WL 1160847, at *1 (Bankr. E.D. Pa. Aug. 14, 2000). Absent express permission in the Bankruptcy Code, Plaintiffs cannot circumvent these ordinary roadblocks. *Cf. id.* (noting the court could waive exhaustion for tax claims because the Bankruptcy Code granted it that power for such claims). Plaintiffs did not identify anything in the Bankruptcy Code waiving the exhaustion requirement for royalty claims. Thus, the Court should enforce that requirement.

Indeed, Plaintiffs confusingly complain that "Extraction cited no bankruptcy cases that expressly deal with the issues raised by the Complaint."[7] If anything, the relative dearth of bankruptcy cases that concern hydrocarbon royalty disputes arising under Colorado law simply undermines Plaintiffs' argument that the Court should resolve such issues as a matter of course. Regardless, bankruptcy courts routinely require litigants to exhaust statutory administrative remedies to maintain suit, and the Court should do so here.

B. Plaintiffs' Administrative Exhaustion Cases Are Inapposite

Plaintiffs misconstrue the cases they cite regarding administrative exhaustion. Plaintiffs argue "the Third Circuit has already stated that 'where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required."[8] In support, Plaintiffs cite *In re University Medical Center*, which turned on whether a claim arose under the Bankruptcy Code or the Medicare Act. *See* 973 F.2d 1065, 1073 (3d Cir. 1992) ("Our ability to exercise jurisdiction over this appeal thus turns on whether [the] claims actually arise under the Medicare statute."). Importantly, the "adversary proceeding was based on

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7 *Opp'n* [A.D.I. 43] at 10 (footnote omitted).

8 *Id.* at 10–11 (quoting *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1072 (3d Cir. 1992)).

the contention that [a party] violated the automatic stay provision of the [B]ankruptcy [C]ode." *Id.* Thus, the "claim [arose] under the Bankruptcy Code and not under the Medicare statute." *Id.*

Under such circumstances, there was "no danger of rendering the administrative review channel superfluous, for there [was] no system of administrative review in place to address the issues raised by [the debtor] in its adversary proceeding." *Id.* at 1073. This conclusion directly led to the proclamation upon which Plaintiffs rely. *See id.* at 1073–74 (stating, immediately after the sentence quoted above: "***Thus*** . . . 'where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required.'") (emphasis added) (quoting *In re Town & Country Home Nursing Services, Inc.*, 963 F.2d 1146, 1154 (9th Cir. 1991)). Contrary to Plaintiffs' suggestions, *University Medical Center* simply stands for the proposition that exhaustion requirements do not govern when they incidentally overlap with claims arising under the Bankruptcy Code. This Court has since so held.[9]

Plaintiffs' next two cases—*In re Venoco, LLC* and *In re PVI Associates*—are inapposite because the courts were concerned with protecting ***the debtor's reorganization*** and requiring exhaustion would have harmed the debtor. Both cases were inverse condemnation cases. *See* 596 B.R. 480, 491 (Bankr. D. Del. 2019) (cleaned up); 181 B.R. 210, 218 (Bankr. E.D. Pa. 1995). The driving force behind these cases was avoiding damage to the debtor's reorganization. *See In re Venoco, LLC*, 596 B.R. at 491 (noting the Court had no "basis to deny the [d]ebtors their choice of forum"); *In re PVI Associates*, 181 B.R. 210, 218 (Bankr. E.D. Pa. 1995) (noting the court was "satisfied that [the debtor] has sufficiently pled the potential [e]ffect on its bankruptcy

[9] *See In re THDL Liquidating LLC*, No. 19-11689, 2020 WL 6818442, at *3 (Bankr. D. Del. July 7, 2020) ("In *University Medical Center*, where the issue was whether the . . . post-petition withholding of Medicare payments violated the automatic stay, the [Third Circuit] recognized the bankruptcy court's authority under the Bankruptcy Code to enforce the automatic stay and prevent the . . . withholding of post-petition payments.") (citation omitted).

case"). Moreover, the inverse condemnation claims were primarily asserted under the United States Constitution,[10] and federal courts have jurisdiction over such claims.

Next, the relevance of *In re Town & Country Home Nursing Services, Inc.*, is subsumed by the Third Circuit's discussion of that case in *University Medical Center* and the Third Circuit's incidental overlap holding, as outlined above. *See In re Univ. Med. Ctr.*, 973 F.2d at 1074 (quoting *In re Town & Country Home Nursing Services, Inc.*, 963 F.2d at 1154). Furthermore, bankruptcy courts criticize *Town & Country* out of concern that it emboldens litigants to assert Plaintiffs' exact argument; bankruptcy courts insist: "[The] filing of a bankruptcy petition does not and should not create a shortcut to judicial review of administrative decisions otherwise subject to exhaustion requirements." *In re AHN Homecare, LLC*, 222 B.R. 804, 809 (Bankr. N.D. Tex. 1998) (favorably discussing Third Circuit bankruptcy cases and criticizing *Town & Country*) (citation omitted). Indeed, Congress has rejected *Town & Country*, albeit on other grounds. *See In re Exact Temp, Inc.*, 231 B.R. 566, 569 (Bankr. D.N.J. 1999) (quoting legislative history stating 11 U.S.C. section 106(b) overruled *Town & Country*'s sovereign immunity holding).

Plaintiffs next quote a ***concurring*** opinion for the proposition that the Commission should not hear this case because a state "has no power to divest a federal court of its constitutionally or congressionally conferred subject matter jurisdiction . . . ."[11] The ***majority*** opinion, however, reversed the trial court and ordered the case to be transferred to a state agency because that agency was responsible for deciding liability. *See MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1106 (3d Cir. 1995). Indeed, the majority said the state agency must hear the claim in the first instance because "***a contrary holding would mean that the federal courts are empowered to decide matters of state law that courts in the affected state lack authority to***

[10] *See In re Venoco, LLC*, 596 B.R. at 486; *In re PVI Associates*, 181 B.R. at 213.
[11] *Opp'n* [A.D.I. 43] at 11 (quoting *MCI Telecommunications Corp.*, 71 F.3d at 1109 (Nygaard, J., concurring)).

resolve." *Id.* (emphasis added). So too here. If Plaintiffs do not exhaust their remedies with the Commission they will force this Court to go where Colorado courts could not—and have held that they will not. *See C&M Res., LLC v. Extraction Oil & Gas, Inc.*, No. 2017CV30685, 2018 Colo. Dist. LEXIS 336, *4. The Third Circuit does not countenance such a result. *See MCI Telecommunications Corp.*, 71 F.3d at 1106.

Unlike the cases cited by Plaintiffs, this is not a case with mere overlap between a core bankruptcy proceeding and a tangentially related exhaustion requirement. Nor is this a case about Colorado trying to divest the Court of subject matter jurisdiction over bankruptcy issues. Instead, this is an adversary proceeding with claims governed by Colorado law and over which the Commission has been vested with jurisdiction. The fact that these claims are raised in the context of an adversary proceeding does not absolve Plaintiffs from the statutory requirement to exhaust their administrative remedies with the Commission.

C. Colorado Law Governs the Resolution of Plaintiffs' Claims

In an effort to fit their claims into the Procrustean bed made of Plaintiffs' cited cases, Plaintiffs argue their claims "***arise under federal law***."[12] With this, Plaintiffs have now argued that their claims arise under Colorado common law,[13] Colorado statutory law,[14] and federal law. To be clear, Colorado law governs. The Court has already held that "federal law may not be applied to questions which arise in federal court but whose determination is not a matter of federal law . . . ." *In re SemCrude, L.P.*, 407 B.R. 112, 133 (Bankr. D. Del. 2009) (quoting *In re Merritt Dredging Co., Inc.*, 839 F.2d 203, 206 (4th Cir. 1988)).

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12 *Opp'n* [A.D.I. 43] at 11 (emphasis added).

13 *Second Am. Compl.* [A.D.I. 24] at 7–8 ("Royalties are a portion of the proceeds derived from the sale of the oil and gas and are calculated and paid pursuant to the terms ***of the Leases and Colorado law***.") (emphasis added).

14 *Brief in Opp'n to Def.'s Mot. to Dismiss the Second Am. Compl.* [A.D.I. 28] at 11 ("Plaintiffs' fraud claim arises ***under a statute***, not the leases.") (emphasis added).

Plaintiffs assert claims for declaratory relief, fraud, breach of contract, breach of implied covenants, conversion, constructive and resulting trusts, unjust enrichment, equitable accounting, and injunctive relief.[15] State law governs the substantive aspect of the declaratory relief claims. *Veridian Credit Union v. Eddie Bauer, LLC*, 295 F. Supp. 3d 1140, 1152 n. 5 (W.D. Wash. 2017) (noting federal law "creates only a remedy and not an independent claim" and state law governs entitlement to the requested relief). State law governs the fraud claims. *In re Decade, S.A.C., LLC*, 612 B.R. 24, 37 (Bankr. D. Del. 2020) (applying state law to fraud claims). State law governs the breach of contract, unjust enrichment, and conversion claims. *See In re Kent*, 615 B.R. 171, 179–181 (Bankr. W.D. Pa. 2020) (applying state law to these claims). State law governs the implied covenant claims. *See In re Welded Constr., L.P.*, 609 B.R. 101, 129 (Bankr. D. Del. 2019) (applying state law to such claims). State law governs the substantive aspects of the injunctive relief claims. *Veridian Credit Union*, 295 F. Supp. 3d at 1152 n. 5 (noting entitlement to injunctive relief is governed by state law). Finally, ***bankruptcy courts apply state-law exhaustion requirements when they govern the availability of a cause of action***. *See In re LymeCare, Inc.*, 301 B.R. at 678 (granting a motion to dismiss an adversary proceeding because of a state law administrative exhaustion requirement).

Plaintiffs simply ignore that this is an adversary proceeding. "An adversary proceeding is essentially a self-contained trial—still within the original bankruptcy case—in which a panoply of additional procedures apply." *In re Mansaray-Ruffin*, 530 F.3d 230, 234 (3d Cir. 2008) (citing Fed. R. Bankr. P. 7001–7087). Because of the incorporation of the Federal Rules of Civil Procedure, "an adversary proceeding [has] all the trapping of traditional civil litigation." *Id.* "Moreover, an adversary proceeding offers the parties the same opportunity for discovery as

[15] *See generally Second Am. Compl.* [A.D.I. 24].

traditional civil litigation, and the rules regarding voluntary and involuntary dismissals, default judgments, and summary judgment are identical as well." *Id.* (citing Fed. R. Bankr. P. 7026–7037). Under ordinary civil litigation principles, a federal court should not decide state law claims that state courts themselves could not resolve. *See MCI Telecommunications Corp.*, 71 F.3d at 1106. Plaintiffs' claims arise under Colorado law, and Colorado law requires administrative exhaustion for the claims. That requirement applies to this adversary proceeding with equal force.

D. Dismissal Would Not Force the Commission to Resolve Bankruptcy Issues

Plaintiffs turn the administrative-exhaustion doctrine on its head when they argue the Commission "cannot resolve bankruptcy issues."[16] Plaintiffs point to only one cause of action ***among fifteen*** to suggest that dismissal would force the Commission to decide bankruptcy issues. Specifically, Plaintiffs point to Count Two, which seeks a declaratory judgment that any alleged underpayments are not property of the bankruptcy estate.[17]

First, Plaintiffs' argument rests on a tenuous foundation. Count Two will be justiciable only if Plaintiffs prove Extraction underpaid their royalties; absent such factual underpayment, Count Two would impermissibly seek an advisory opinion because it would concern a hypothetical situation. *See Pittsburgh Mack Sales & Serv., Inc. v. Int'l Union of Operating Engineers, Local Union No. 66*, 580 F.3d 185, 190 (3d Cir. 2009) (noting one of the elements of declaratory judgment ripeness asks "whether judicial action at the present time would amount to more than an advisory opinion based upon a hypothetical set of facts") (quoting *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1468 (3d Cir. 1994)).

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16 *Opp'n* [A.D.I. 43] at 10.

17 *See id.* ("A primary issue in dispute is whether Plaintiffs' royalties derived from their oil and gas rights constitute the Plaintiffs' property improperly held by Extraction or property of Extraction's bankruptcy estate.")

Second, Count Two is not as founded on bankruptcy law as Plaintiffs suggest. To determine whether royalty underpayments are property of the bankruptcy estate, the Court must first assess the nature of a Colorado royalty interest. Federal courts addressing the same type of claims under Colorado law have dismissed them so that the Commission can consider the royalty dispute in the first instance. *See Boulter v. Noble Energy, Inc.*, 20-CV-861-WJM-KLM, 2021 WL 615413, at *7 (D. Colo. Feb. 17, 2021).

Third, even if Count Two were not subject to administrative exhaustion, the proper result would be to dismiss all of Plaintiffs' claims except Count Two because, in essence, Plaintiffs' argument is that Count Two is outside the scope of the Commission's jurisdiction.[18] This would not protect the fourteen other claims. Even if Plaintiffs are correct on this point (they are not, for the reasons above), the Court should dismiss every claim except Count Two.

II. PLAINTIFFS' ROYALTY CLAIMS ARE WITHIN THE SCOPE OF THE COMMISSION'S JURISDICTION

Plaintiffs' argument about the Commission's jurisdiction is flawed: (1) Plaintiffs have no substantive answer to the most recent cases discussing the Commission's jurisdiction and their own cases are unreliable; (2) the Commission's expertise is irrelevant; (3) Plaintiffs' futility argument fails; and (4) the Plan does not eliminate statutory administrative exhaustion.

A. The Most Recent, and Better Reasoned, Cases Reject Plaintiffs' Arguments

Plaintiffs have no response to the most recent cases discussing the preclusive effect of the Commission's jurisdiction. Indeed, Plaintiffs do not even mention *Boulter*, the weeks-old case from a federal court sitting in Colorado that was repeatedly cited in the motion to dismiss.[19] Instead, Plaintiffs note Extraction's cases are non-binding—as are Plaintiffs'—and misconstrue

[18] *See id.* at 12 (arguing, among other things, "that federal courts have exclusive jurisdiction ***to determine whether or not property held by the debtors constitutes property of the estate***") (emphasis added) (citation omitted).

[19] *See generally id.* (failing to mention *Boulter*, 2021 WL 615413).

Extraction's argument. Concerning the latter, Plaintiffs say, "[a]ccording to Extraction, this Court lacks jurisdiction over Plaintiffs' claims because Plaintiffs could be future class members in a putative class action filed before Extraction filed its bankruptcy petition . . . ."[20] The link between the putative class and Plaintiffs is just icing on the cake. The main argument is that the "Colorado cases are ***factually and legally on-point***, and the same outcome should result here: dismissal for lack of subject matter jurisdiction."[21]

Furthermore, Plaintiffs misconstrue their own cases. ***First***, Plaintiffs make passing reference to *Garman*, but they actually rely on the Commission's interpretation of *Garman*.[22] However, the Commission, not Plaintiffs, decides how *Garman* impacts this case. Moreover, *Garman* does not concern the issues before the Court. *See Garman v. Conoco, Inc.*, 886 P.2d 652, 653 (Colo. 1994) (defining the question before the court as whether a royalty interest owner must bear a share of post-production costs in certain situations).

Second, Plaintiffs point to *Grynberg*,[23] a common move for those in Plaintiffs' position, and one that Colorado courts have often rejected. Indeed, in royalty litigation against Extraction a putative class also argued that *Grynberg* required denial of a motion to dismiss under the administrative-exhaustion doctrine. *See C&M Res., LLC*, 2018 Colo. Dist. LEXIS 336, *4. The Colorado court disagreed because the case's claims did "not suggest that any contractual interpretation is necessary," rendering *Grynberg* inapposite. *See id.* The claims were that Extraction breached its royalty agreements "(1) by deducting penalties imposed by third-party pipeline operators from the royalties; (2) by falsely reporting the per-barrel price of oil sold as

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[20] *Id.* at 13 (emphasis in original).
[21] *Brief in Support of Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction* [A.D.I. 38] at 11 (emphasis added).
[22] *Opp'n* [A.D.I. 43] at 19.
[23] *Id.* (citing *Grynberg v. Colorado Oil & Gas Conservation Comm'n*, 7 P.3d 1060, 1062 (Colo. App. 1999)).

post-penalty rather than pre-penalty; (3) by failing to properly calculate, report, and pay royalties; and (4) by deducting post-production costs for rendering natural gas marketable from the royalties." *Id.* Here, Plaintiffs similarly assert that "the produced but unsold oil and gas, prohibited [d]eductions, failure to pay market prices, title errors, and nonpayments, and associated calculation errors have resulted in the estimated underpayment of [r]oyalties to Plaintiffs . . . ." *Second Am. Compl.* [A.D.I. 24] at 13. Given such claims, Colorado courts have repeatedly held that *Grynberg* does not govern.[24] Indeed, a federal court has astutely noted "*Grynberg* ***was a review of the [Commission's] decision to decline jurisdiction***" and "[t]his procedural posture reinforces the notion that [the Commission] determines in the first instance whether it has jurisdiction . . . ." *Boulter*, 2021 WL 615413, at *6 (emphasis added). In other words, to "argue that *Grynberg* is directly on point, Plaintiffs must first assume that a dispute regarding contractual interpretation exists; such an assumption, however, invades the province of the [Commission]." *Id.*

Third, Plaintiffs turn to *Atlantic Richfield*.[25] Courts reject reliance on this case because "[e]xhaustion of administrative remedies was not at issue in *Atlantic Richfield*." *Boulter*, 2021 WL 615413, at *6. Instead, "[i]n *dicta*, the Tenth Circuit stated that the [Colorado] Act [at issue in this case] did not apply to claims alleging a breach of contract." *Id.* (citing *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1156 (10th Cir. 2000)). Furthermore, as above, presuming the existence of a contractual dispute "runs afoul of the Act's grant of jurisdiction to the [Commission] to decide such an issue." *Id.*

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[24] *See, e.g.*, *Order* [D.I. 459-7] at 2 ("[A]lthough the parties do not raise the issue, I believe this complaint is precluded by the prior case in which [p]laintiffs made, and lost, this same jurisdictional argument.") (citation omitted); *C&M Res., LLC*, 2018 Colo. Dist. LEXIS 336, at *11 ("Plaintiffs repeatedly state that all the courts finding [*Grynberg*] inapplicable made 'legally erroneous' findings. Perhaps this is the case; or, as is the case here, perhaps the courts finding [*Grynberg*] inapplicable found no issues requiring contractual interpretation.").

[25] *Opp'n* [A.D.I. 43] at 20 (citing *Atl. Richfield Co.*, 226 F.3d at 1157).

Fourth, *Chase*[26] is inapposite for the all the same reasons as *Grynberg* and *Atlantic Richfield*. *See* *Chase v. Colorado Oil & Gas Conservation Comm'n*, 284 P.3d 161, 162 (Colo. Ct. App. July 19, 2012) (noting the case was an appeal from the Commission's rulings).

Fifth, Plaintiffs rely on *Retova*[27] and *Chrichton*[28] to argue that the Commission is not the threshold arbiter of the contract-interpretation exception to its jurisdiction, and that Extraction's contrary argument is "a red herring."[29] Plaintiffs' argument, however, is the fishy one.

In *Retova*, the court held that the statute setting out the Commission's jurisdiction was directed only at the Commission and not litigants; thus, the court held that it could decide the contract-interpretation exception. *See id.* at 3. *Crichton* also said "the statute does not require that disputes may be filed in district court *only* after a [Commission] determination that the dispute is contractual in nature." *Crichton v. Augustus Energy Res., L.L.C.*, 15-CV-00835-KLM, 2017 WL 4838735, at *4 (D. Colo. Oct. 26, 2017) (emphasis in original). Both *Retova* and *Chrichton* rely on a weak reading of the following language: "***[T]he oil and gas conservation commission shall*** determine whether a bona fide dispute exists regarding the interpretation of a contract . . . ." Colo. Rev. Stat. § 34-60-118.5(5.5) (emphasis added). Essentially, *Retova* and *Chrichton* read this provision as only imposing a ***duty*** on the Commission. The bolded language, however, is better interpreted as a grant of ***power*** to serve as threshold arbiter of jurisdiction. Indeed, recent cases have so held. *See Boulter*, 2021 WL 615413, at *5 ("[I]t is clear that the [Commission] has jurisdiction to determine in the first instance whether there is a bona fide dispute").

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[26] *Id.* at 14 (citing *Chase*, 284 P.3d at 162).
[27] *See generally Opp'n Ex. 1* [A.D.I. 43-1].
[28] *Opp'n* [A.D.I. 43] at 20 (citing *Crichton v. Augustus Energy Res., L.L.C.*, 15-CV-00835-KLM, 2017 WL 4838735, at *4 (D. Colo. Oct. 26, 2017)).
[29] *Id.* at 16.

Furthermore, contrary to *Retova* and *Crichton*, the statute actually does speak to litigants: "If the [C]omission finds that such a dispute exists, the [C]omission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court." Colo. Rev. Stat. § 34-60-118.5(5.5). In other words, the statute allows litigants to "seek resolution of the matter in district court" only after the Commission has found that it lacks jurisdiction. *See id.* Once again, recent cases have so held. *See Boulter*, 2021 WL 615413, at *5 ("[Only once the Commission] finds that such a dispute exists does it decline jurisdiction. At that point, 'the parties may seek resolution of the matter in district court.'") (quoting Colo. Rev. Stat. § 34-60-118.5(5.5)). Indeed, the United States District Court for the District of Colorado rejected application of its earlier *Crichton* decision for this very reason. *See id.* at *7 (discussing the contract-interpretation exception and noting: "In *Crichton* . . . the court determined that the dispute was 'contractual in nature,' whereas here, the [c]ourt has found that based on the dispute between the parties, it cannot definitively state that the dispute is contractual in nature. This is for the [Commission] to decide.") (citing *Crichton*, 2017 WL 4838735, at *4).

B. The Commission's Expertise Is Irrelevant

Plaintiffs argue that the Commission "lacks the expertise related to Plaintiffs' [c]laims,"[30] but the Commission's expertise is irrelevant. Plaintiffs err by relying on cases addressing ***prudential*** exhaustion. *See Anjelino v. New York Times Co.*, 200 F.3d 73, 87 (3d Cir. 1999) ("Failure to exhaust is in the nature of statutes of limitation and [does] not affect . . . subject matter jurisdiction.") (emphasis added) (cleaned up). This case, however, involves ***statutory*** exhaustion, which is jurisdictional. *Lin v. Attorney Gen. of U.S.*, 543 F.3d 114, 120 (3d Cir. 2008) ("[Unlike] judicially-crafted exhaustion doctrines, statutory exhaustion requirements deprive [courts] of

[30] *Opp'n* [A.D.I. 43] at 15–16.

jurisdiction over a given case.").[31] Agency expertise is irrelevant because the touchstone is Plaintiffs' noncompliance with statutory requirements. *See Boulter*, 2021 WL 615413, at *5 (dismissing a claim for failure to comply with a statutory exhaustion requirement).

C. Plaintiffs' Futility Argument Is Ineffectual

Plaintiffs assert a futility argument via reliance on several Commission Orders discussing the Commission's jurisdiction under the facts and circumstances of particular cases.[32]

First, the futility exception is simply inapplicable, and Plaintiffs again conflate prudential exhaustion with statutory exhaustion. A "prudential exhaustion requirement is generally judicially created, aimed at respecting agency autonomy by allowing it to correct its own errors." *Wilson v. MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007) (citing *Robinson v. Dalton*, 107 F.3d 1018, 1020 (3d Cir. 1997)). "Because of its nature, ***prudential exhaustion*** can be bypassed under certain circumstances, including . . . ***futility***." *Id.* (emphasis added) (citing *Robinson*, 107 F.3d at 1021–22). "***Jurisdictional exhaustion, however, is a prerequisite to a court's subject matter jurisdiction.*** Regardless of whether there is a compelling reason a plaintiff failed to exhaust, a court is without subject matter jurisdiction to hear the plaintiff's claim." *Id.* (emphasis added) (citing *Nyhuis v. Reno*, 204 F.3d 65, 69 (3d Cir. 2000)). Because this case's exhaustion requirement is jurisdictional,[33] Plaintiffs' futility argument is, itself, futile.

Second, Colorado law vests the Commission with the power to review and decide the extent of its jurisdiction. *See* Colo. Rev. Stat. § 34-60-118.5(5.5). Plaintiffs do not have authority

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[31] *Accord Dugan v. Coastal Indus., Inc.*, 96 F. Supp. 2d 481, 485 (E.D. Pa. 2000) ("In short, it is clear from the face of the pleadings that Karen Dugan never filed an administrative claim as required by [section] 2675, and thus did not exhaust her claim prior to filing this lawsuit. For that reason, this court has no subject matter jurisdiction over her claim, and her claim will be dismissed pursuant to Rule 12(b)(1).") (citing *Yillah v. United States*, CIV. A. 98-2842, 1998 WL 661545, at *2 (E.D. Pa. Sept. 24, 1998)).

[32] *See Opp'n* [A.D.I. 43] at 17–18 (discussing Commission Orders and arguing "exhaustion would have been futile") (citation omitted).

[33] *See Boulter*, 2021 WL 615413, at *7 (dismissing for lack of subject matter jurisdiction).

to speak on the Commission's behalf or ignore Colorado law based on their predictions about what the Commission might hold in this instance. Instead, Plaintiffs are limited to arguing that the Commission Orders show futility, but (again) futility has no place in statutory exhaustion analysis.

Third, the notion that Plaintiffs need not present their claims to the Commission because "[c]learly, the [Commission] would dismiss Plaintiffs' [c]laims"[34] is faulty. A federal court already rejected "contention[s] that it [was] 'clear beyond reasonable doubt that the [Commission] would not exercise jurisdiction over . . . royalty underpayment claims . . . ." *Boulter*, 2021 WL 615413, at *5. The court did so when faced with the same argument asserted here, that "there is a bona fide dispute over the interpretation of the royalty provisions at issue, so the [Commission] lacks jurisdiction, and it would therefore be futile" to present a case to the Commission. *Id.* Plaintiffs' reliance on past Commission Orders does not establish futility.

D. The Plan Does Not—and Cannot—Thwart Colorado Law

Finally, Plaintiffs seem to suggest that the Plan's terms dictate the Commission's jurisdiction.[35] The provision that Plaintiffs point to actually refutes Plaintiffs' argument because it says "a court, arbiter, ***or other tribunal***" may decide the royalty issues.[36] Regardless, the Plan cannot create subject matter jurisdiction where it is otherwise absent.

CONCLUSION

Colorado's legislature considered how to resolve royalty disputes between lessors and lessees, and their chosen solution was to vest the Commission with jurisdiction to consider such claims in the first instance. Plaintiffs concede their failure to exhaust their administrative remedies with the Commission. The Court, therefore, should dismiss Plaintiffs' claims.

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34 *Opp'n* [A.D.I. 43] at 18–19.
35 *See id.* at 21.
36 *Id.* (emphasis added) (citation omitted).

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Wilmington, Delaware

/s/ Stephen B. Gerald

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CERTIFICATE OF SERVICE

I certify that on April 2, 2021, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the District of Delaware.

/s/ Stephen B. Gerald
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