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: Adv. Docket Nos. 65, 66 & 68
EXTRACTION OIL & GAS, INC.,	
Defendant.	

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF COURT'S SEPTEMBER 20, 2021 ORDER

INTRODUCTION

Plaintiffs' Motion for Reconsideration (the "Motion") is improper and fails as a matter of law. The Court held that the Colorado Oil and Gas Conservation Commission (the "Commission") has jurisdiction to resolve this case's claims and the Commission gets to decide any exceptions to its jurisdiction in the first instance. Now, Plaintiffs urge the Court to find that they were excused from compliance with the law on futility grounds. Futility, however, is categorically unavailable

[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 5200, Denver, Colorado 80202.

in this case. Even if it were available (which it is not), Plaintiffs have failed to establish the futility exception's applicability. Furthermore, the Motion relies on authority or evidence that could have—and should have—been raised before the ruling on the Motion to Dismiss and does not show a clear error of fact or law; it simply relitigates the same issues the Court already considered and ruled upon. The Court should deny the Motion for any of these reasons.

LEGAL STANDARD

A motion for reconsideration under Federal Rule of Civil Procedure 59(e)[2] is "an extremely limited procedural vehicle." *Neal v. Asta Funding, Inc.*, No. CV 14-2495 (KM)(MAH), 2016 WL 7238795, at *1 (D.N.J. Dec. 14, 2016) (quoting *Tehan v. Disability Mgmt. Servs., Inc.*, 111 F. Supp. 2d 542, 549 (D.N.J. 2000)). Such motions are "not for rearguing issues that the court has already considered and decided." *Ward v. Delaware*, No. CV 15-487-LPS, 2019 WL 3205785, at *1 (D. Del. July 16, 2019) (citing *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990)). Instead, Plaintiffs must show "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice." *Id.* (citing *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)).

ARGUMENT

I. FUTILITY IS NOT AN EXCEPTION TO THE STATUTORY ADMINISTRATIVE EXHAUSTION REQUIREMENT AT ISSUE IN THIS CASE

The futility exception is not applicable because the relevant exhaustion requirement is statutory and jurisdictional. Just this year, the Third Circuit again said that there are no futility

[2] Plaintiffs have not identified whether they moved for reconsideration under Federal Rule of Civil Procedure 59(e) or Federal Rule of Civil Procedure 60(b), but Plaintiffs recite the standard for Rule 59(e) and cite a case applying that Rule. *See* Mot. (A.D.I. 68) (citing *In re Conex Holdings, LLC*, 524 B.R. 55, 58 (Bankr. D. Del. 2015)). Regardless, "when a motion for reconsideration is filed within 28 days of the entry of judgment, it must be considered under Rule 59(e), not Rule 60(b)." *Ward*, 2019 WL 3205785, at *1 (citation omitted).

exceptions to statutory exhaustion requirements. *See Hernandez-Chavez v. Att'y Gen. United States*, 843 F. App'x 423, 426 n.6 (3d Cir. 2021) (discussing the Third Circuit's rejection of futility exceptions to statutory exhaustion requirements). The United States District Court for the District of Delaware also recognizes this longstanding rule. *See Hum. Genome Scis., Inc. v. Genentech, Inc.*, 589 F. Supp. 2d 512, 519 (D. Del. 2008) ("When exhaustion is required by statute, its application is not subject to judicial discretion. This 'judicial exhaustion' is a prerequisite to a court's subject matter jurisdiction.") (citation omitted). Importantly, futility is the only argument raised in the Motion. *See* Mot. [A.D.I. 68] at 2 ("Plaintiffs respectfully request that the Court reconsider its Order and enter an order denying the [motion to dismiss] under the futility exception to exhaustion . . . ."). Thus, the Court should deny the Motion.

Plaintiffs err by treating this case as if it concerns the wrong type of exhaustion.[3] The Third Circuit recognizes two types of administrative exhaustion: prudential exhaustion and statutory exhaustion. *Wilson v. MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007) ("The parties' arguments bring to bear the distinction between prudential exhaustion and jurisdictional exhaustion."). When explaining the differences between the two, the Third Circuit foreclosed Plaintiffs' futility argument:

> A prudential exhaustion requirement is generally judicially created, aimed at respecting agency autonomy by allowing it to correct its own errors. Because of its nature, prudential exhaustion can be bypassed under certain circumstances, including waiver, estoppel, tolling or futility. 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.

[3] Tellingly, Plaintiffs did not address the unavailability of futility despite this issue being raised in the Court's Opinion and in prior briefing. *See* Op. (A.D.I. 65) at 13; Reply in Support of Mot. to Dismiss (the "Reply") (A.D.I. 46) at 20–21.

Id. (citations omitted). In other words, futility is available only for prudential exhaustion because the doctrine is of judicial creation and is a matter of prudence. *See id.* Statutory exhaustion, however, is non-discretionary and an absolute bar to jurisdiction. *See id.*[4] This is true "[r]egardless of whether there is a compelling reason a plaintiff failed to exhaust," including alleged futility. *Id.* Put simply, a jurisdictional exhaustion requirement "***by definition cannot be subject to a futility exception***." *Nyhuis v. Reno*, 204 F.3d 65, 69 (3d Cir. 2000) (emphasis added).

This case involves a statutory exhaustion requirement directed to the Court's jurisdiction. The requirement to present one's claims to the Commission is not a prudential, judge-made doctrine; it is a creature of statute that expressly addresses decision-making jurisdiction:

> Absent a bona fide dispute over the interpretation of a contract for payment, the [Commission] shall have jurisdiction to determine the following: (a) The date on which payment of proceeds is due a payee under subsection (2) of this section; (b) The existence or nonexistence of an occurrence pursuant to subsection (3) of this section which would justifiably cause a delay in payment; and (c) The amount of the proceeds plus interest, if any, due a payee by a payer.

Colo. Rev. Stat. § 34-60-118.5(5). The statute also reserves the threshold jurisdictional exception to the Commission: "Before hearing the merits of any proceeding regarding payment of proceeds pursuant to this section, the [Commission] shall determine whether a bona fide dispute exists regarding the interpretation of a contract defining the rights and obligations of the payer and payee." *Id.* § 118.5(5.5). Only after the Commission makes such a finding are the parties free to petition the courts. *See id.* ("If the commission finds that such a dispute exists, the commission shall decline jurisdiction over the dispute and the parties may seek resolution of the matter in district court.").

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[4] *See also, e.g.*, *Kerr v. Att'y Gen. of United States*, 767 F. App'x 347 (3d Cir. 2019) ("This statutory exhaustion requirement is jurisdictional.") (citing *Xie v. Ashcroft*, 359 F.3d 239, 245 n.8 (3d Cir. 2004)); *Guariglia v. Loc. 464A United Food & Com. Workers Union Welfare Serv. Ben. Fund*, No. CIV.A. 13-01110 SDW, 2013 WL 6188510, at *6 (D.N.J. Nov. 25, 2013) ("This is significant because, unlike jurisdictional exhaustion where a plaintiff's failure to exhaust administrative remedies automatically strips the court of subject matter jurisdiction, prudential 'exhaustion can be bypassed under certain circumstances.'") (quoting *Wilson*, 475 F.3d at 174).

Plaintiffs' failure to exhaust their administrative remedies is a bar to the Court's jurisdiction irrespective of any alleged futility. Thus, the Court should deny the Motion.

II. PLAINTIFFS FAILED TO MAKE A SHOWING OF FUTILITY

Even assuming it is relevant (it is not), Plaintiffs failed to establish futility. "Even prudential exhaustion requirements will be excused in only a narrow set of circumstances." *Wilson*, 475 F.3d at 175. To "invoke the futility exception to exhaustion, a party must 'provide a clear and positive showing' of futility before the [Court]." *Id.* (quoting *D'Amico v. CBS Corp.*, 297 F.3d 287, 293 (3d Cir. 2002)). Plaintiffs failed to make this showing, and the Court should deny the Motion.

As Extraction already pointed out, just this year a federal court sitting in Colorado and applying Colorado law rejected similar "contention[s] that it [was] 'clear beyond reasonable doubt that the [Commission] would not exercise jurisdiction over . . . royalty underpayment claims . . . .'" *Boulter v. Noble Energy, Inc.*, 521 F. Supp. 3d 1077, 1085 (D. Colo. 2021). Like this Court, *Boulter* explained it was not prejudging "one way or another as to whether the [Commission] or a court of law has jurisdiction over this dispute." *Id.* at 1086. Instead, *Boulter* recognized that the Commission has authority to determine in the first instance whether a bona fide dispute exists that divests it of jurisdiction. *See id.* This result matches general futility law because the "mere fact that an adverse decision may have been likely does not excuse [a party] from a statutory or regulatory requirement that it exhaust administrative remedies." *Human Genome Sciences, Inc.*, 589 F. Supp. 2d at 523 (quoting *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)).

Even the Motion's exhibits demonstrate Plaintiffs' error. Plaintiffs argue that an update to the Commission's guidebook shows "the Commission would dismiss this dispute for lack of jurisdiction, rendering exhaustion of administrative remedies futile." Mot. [A.D.I. 68] at 3.[5] Plaintiffs, however, also point to a subsequent Colorado case that reviewed the Commission's finding that it lacked jurisdiction. That case never mentioned the guidebook or the idea that the Commission's prior statements were evidence of futility. *See generally* Colo. Op. [A.D.I. 68-2]. Instead, the parties did exactly what the Court told Plaintiffs to do: they presented their claims to the Commission, the Commission decided the scope of its own jurisdiction, and the case went through the Colorado appellate process. *See id.* at 4.

Finally, Plaintiffs' arguments about the leases are a *non sequitur*. Plaintiffs criticize the Court and say it "did not apply the law here because [it said] 'it is not clear from the face of the Complaint whether the Plaintiffs have raised a bona fide dispute.'" Mot. (A.D.I. 68) at 4. Plaintiffs assert the Court was wrong because the Court also said Plaintiffs brought claims for underpaid royalties and the leases govern the royalty payment. *See id.* There is no contradiction in the Court's statements; the complaint has not raised a bona fide dispute about the leases and the leases govern the payment of royalties. Indeed, Plaintiffs' argument that "[b]ecause leases are contracts that govern the payment of Plaintiffs' royalties, this case does not fall within the jurisdiction of the Commission" makes no sense. If true, Plaintiffs' argument would preclude the Commission from ever deciding a case; the payment of royalties is always governed by leases. If the mere existence of a lease defeated the Commission's jurisdiction, then that jurisdiction would be a nullity.

[5] The revision of the guidebook itself demonstrates that the Commission is still considering the scope of its jurisdiction. This reinforces that the Commission should be the entity that applies its governing statute in the first instance and should direct how Colorado law develops in this area.

Plaintiffs have the burden of making a clear showing of futility. They did not do so before the Court's opinion, and they have not done so now. The Court should deny the Motion.

III. PLAINTIFFS FAIL TO SHOW A VALID BASIS FOR RECONSIDERATION

The Court should deny the Motion for another reason: Plaintiffs failed to carry their burden of justifying the Motion. Courts routinely deny motions for reconsideration where the movants fail to show an intervening change in the law, previously unavailable evidence, or a clear legal error.[6] Because Plaintiffs failed to do so, the Court should deny the Motion.

First, Plaintiffs point to a January 14, 2021 update to the Commission's guidebook. *See* Mot. [A.D.I. 68] at 2–3. Extraction's motion to dismiss for lack of subject matter jurisdiction was filed on March 16, 2021. *See* Mot. to Dismiss [A.D.I. 37] at 1. The update cannot be an intervening change in the law or previously unavailable evidence because it existed before Extraction filed its motion. Similarly, the update cannot show "clear legal error" because courts applying Colorado law held that the Commission has jurisdiction to decide these disputes—and to decide the threshold matter of its own jurisdiction—after the guidebook's creation. *See Boulter*, 521 F. Supp. 3d at 1077 (noting a decision date of February 17, 2021). Indeed, ***Plaintiffs have still refused to discuss Boulter***, notwithstanding that *Boulter* postdates the guidebook and the Court relied on the case in its Opinion. *See* Op. [A.D.I. 65] at 12 ("Therefore, the Court agrees with Extraction that the reasoning of *Boulter* is more on point than *Crichton*.") (citations omitted). Finally, Plaintiffs argue the guidebook reiterates the Commission's beliefs, but the parties already litigated the impact of such beliefs on futility. *See* Reply [A.D.I. 46] at 21 ("[T]he notion that Plaintiffs need not present

[6] *See, e.g.*, *Ward*, 2019 WL 3205785, at *2 (denying a motion for reconsideration because the "allegations d[id] not assert any intervening change in law, the availability of previously unavailable evidence, or a 'clear error of law' . . . ."); *Cohen v. Miceli*, No. CV 17-1352-RGA, 2019 WL 2231181, at *1 (D. Del. May 23, 2019) ("[T]he Court finds that Plaintiff has failed to demonstrate any of the grounds necessary to warrant reconsideration."); *Hall v. Pierce*, No. CV 14-890 (MN), 2019 WL 403710, at *1 (D. Del. Jan. 31, 2019) ("Plaintiff's motion for reconsideration fails on the merits because he has not set forth any intervening changes in controlling law, new evidence, or clear errors of law or fact made by the Court to warrant granting reconsideration.") (citation omitted).

their claims to the Commission because 'clearly, the Commission would dismiss Plaintiffs' claims' is faulty.") (cleaned up). Furthermore, the cited provision of the guidebook simply echoes the statutory command about contract disputes; it does not say the Commission does not get to decide whether this exception applies, nor does it state the Commission would not decide the royalty dispute in this case.[7] The guidebook does not justify reconsideration of the Opinion.

Furthermore, the guidebook is unavailable to Plaintiffs notwithstanding the assertion that they "recently discovered the amendment . . . ." *See* Mot. [A.D.I. 68] at 3. As mentioned, the guidebook update predates the motion to dismiss so Plaintiffs had an opportunity to raise it already. At a minimum, Plaintiffs should have discovered the update in the exercise of reasonable diligence before the Court's ruling ***roughly nine months after the update***. A motion for reconsideration "is not a vehicle for a litigant to raise new arguments ***or present evidence that could have been raised prior to the initial judgment***." *Neal*, 2016 WL 7238795, at *1 (emphasis added) (citing *Bapu Corp. v. Choice Hotels Int'l, Inc.*, No. CIV. 07-5938 WJM, 2010 WL 5418972, at *1 (D.N.J. Dec. 23, 2010)). The Court should refuse to consider the guidebook.

Second, the June 3, 2021 appeal from the Commission ("*Airport Land*") also raises nothing new. The Court already observed that many of Plaintiffs' cases in the prior round of briefing were "cases reviewing the Commission's decisions on appeal . . . ." Op. [A.D.I. 65] at 12. The same thing is true of *Airport Land*. *See* Colo. Op. [A.D.I. 68-2] at 3. The lone issue in *Airport Land* was whether the Commission correctly decided its own jurisdiction when it acted as threshold arbiter. *See id.* at 4 ("[W]e conclude that [the Commission] correctly determined that it lacked jurisdiction over [the claims]."). Accordingly, *Airport Land* supports the Court's holding that

[7] Mot. (A.D.I. at 68) at 3 ("The updated [guidebook] made clear: "Even if there is a dispute regarding the proper payment of royalties, the Commission does not have jurisdiction to resolve the dispute if the dispute arises out of a contract.") (citation omitted).

"[t]he Commission can and should determine whether it has the authority to resolve the Claims." Op. [A.D.I. 65] at 13. Indeed, *Airport Land* relied on the Commission's factual findings, further undercutting the argument that courts—not the Commission—are the threshold arbiter of the Commission's jurisdiction. *See* Colo. Op. [A.D.I. 68-2] at 18. Similarly, Plaintiffs miss the point with their argument that *Airport Land* "clarified that disputes involving a bona fide dispute over the interpretation of a contract for payment should be brought in the district court." Mot. [A.D.I. 68] at 4. Nobody disagrees; the statute itself says as much. The salient questions are: (1) whether this case actually involves a bona fide dispute over a contract's interpretation and (2) who gets to decide that question? The procedural posture of *Airport Land* demonstrates that the Commission is the threshold arbiter of its jurisdiction.

Furthermore, as with the guidebook, Plaintiffs should have raised *Airport Land* sooner. *Airport Land* was decided on June 3, 2021. *See generally* Colo. Op. [A.D.I. 68-2]. The Court's Opinion was issued on September 20, 2021. *See* Op. [A.D.I. 65] at 13. If they truly believed that *Airport Land* was relevant, Plaintiffs should have filed a notice of supplemental authority in the interim. Instead, they either reserved the case for a second bite at the apple[8] or failed to identify it sooner. Either way, such conduct should not be rewarded.

Plaintiffs have not identified any new authority or evidence supporting a motion for reconsideration, and the Motion should be denied. More fundamentally, the proper procedure is what the Court already prescribed: Plaintiffs should present their claims to the Commission, and the Commission will decide whether the exception to its jurisdiction applies. This is the procedure required by statute and followed in the cases upon which Plaintiffs rely.

[8] It seems Plaintiffs are presenting *Airport Land* to relitigate their arguments about another case because they think the Court gave those arguments insufficient attention. *See* Mot. [A.D.I. 68] at 4 (arguing *Airport Land* supports Plaintiffs' interpretation of another case that was "heavily relied upon by Plaintiffs in their Response but left unanalyzed by the Opinion").

CONCLUSION

Plaintiffs have demonstrated recalcitrance in their refusal to bring their claims before the Commission. Rather than obeying the law they purport to enforce, Plaintiffs are trying to force the Court to resolve an issue of Colorado law reserved for a Colorado administrative body by Colorado's legislature. The Motion identifies no authority that warrants reconsideration. If anything, the Motion reinforces the mandate Plaintiffs refuse to heed. The Court should deny the Motion.

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Dated: October 18, 2021
Wilmington, Delaware

/s/ Stephen B. Gerald

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

CERTIFICATE OF SERVICE

I, Stephen B. Gerald, certify that on October 18, 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 and upon the parties set forth on the attached service list via electronic mail.

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