

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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|---------------------------------|---|---|
| |) | Chapter 11 |
| In re: |) | |
| |) | Case No. 20-11550 (CSS) |
| 8 NORTH, LLC, ¹ |) | |
| |) | (Formerly Jointly Administered under |
| Reorganized Debtor. |) | Lead Case: Extraction Oil & Gas, Inc., |
| |) | Case No. 20-11548) |
| |) | |
| ANNETTE LEAZER, <i>et al.</i> , |) | |
| |) | Adv. Proc. No. 20-50963 (CSS) |
| Plaintiffs, |) | |
| |) | Related to Docket Nos. 65–66, 68, 69 |
| v. |) | |
| |) | Hearing Date: November 2, 2021 at 1:00 p.m. ET |
| |) | Obj. Deadline: October 20, 2021 at 4:00 p.m. ET |
| EXTRACTION OIL & GAS, INC., |) | |
| |) | |
| Defendant. |) | |

REPLY IN SUPPORT OF PLAINTIFFS’ MOTION FOR RECONSIDERATION OF
THE COURT’S SEPTEMBER 20, 2021 ORDER

In further support of their *Motion for Reconsideration of Court’s September 20, 2021 Order* [Docket No. 68] (the “*Reconsideration Motion*”),² the above-captioned plaintiffs (the “*Plaintiffs*”) submit this reply (this “*Reply*”) to the *Response in Opposition to Plaintiffs’ Motion for Reconsideration of Court’s September 20, 2021 Order* [Adv. Docket No. 69] (the “*Response*”), and state as follows:

¹ 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’ service address is 370 17th Street, Suite 5300, Denver, Colorado 80202. On October 25, 2021, the Court entered an order [Docket No. 2070] closing the chapter 11 cases of the Reorganized Debtors other than Case No. 20-11550 (CSS).

² All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.



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I. Futility is a Well-Recognized Exception to the Exhaustion Requirement at Issue.

1. The Response’s attempt to categorize the administrative exhaustion requirement at issue as either “statutory” or “prudential” is not only misguided, but also overlooks that this Court applied Colorado’s law on administrative exhaustion, not the law of the Third Circuit. Colorado law clearly recognizes futility as an exception to administrative requirements imposed by the state’s own statutes. *See Op.*, at pp. 5–6 (citing Colorado cases); *see also Crow v. Penrose-St. Francis Healthcare Sys.*, 169 P.3d 158, 165 (Colo. 2007) (stating that futility, failure to promote the policy reasons for administrative exhaustion, and an agency’s lack of authority to rule are exceptions to administrative exhaustion requirements). As stated by one court:

If the agency refuses to reconsider its decisions or procedures, or has stated a categorical rule to apply in a group of cases, rendering exhaustion futile, requiring the protesting party to pursue administrative remedies would not further such interests as allowing the agency to correct its own errors and to develop a record for judicial review. In these and other instances in which an exception applies, courts will excuse a party's failure to exhaust available administrative remedies because those situations do not implicate the interests underlying the exhaustion requirement.

City & Cnty. of Denver v. United Air Lines, 8 P.3d 1206, 1213 (Colo. 2000) (internal citations omitted).

2. Moreover, when the administrative agency “does not have the authority to grant the relief requested by the party seeking judicial action, and the available administrative remedies are ‘ill-suited’ for providing the relief requested, administrative exhaustion is not required.” *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*, 2016 COA 178, 409 P.3d 637, 642 (citing *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995)).

3. Here, it is beyond question that the Colorado Oil and Gas Conservation Commission (the “*Commission*”) is an administrative agency granted rule-making authority

under Colorado law. COLO. REV. STAT. §§ 34-60-101 *et seq.* Accordingly, futility is an available excuse for Plaintiffs' failure to exhaust administrative remedies.

II. Any Attempt to Exhaust Administrative Remedies Would be Futile.

4. Under the futility exception, "exhaustion is not necessary when it is clear beyond a reasonable doubt that further administrative review by the agency would be futile because the agency will not provide the relief requested." *Brown v. Jefferson Cnty. Sch. Dist. No. R-1*, 2012 COA 98, ¶ 17, 297 P.3d 976, 981 (citing *United Air*, 8 P. 3d at 1213). Moreover, despite the Defendant's assertions, *Boulter* clearly recognizes futility as an excuse — "[if] the agency refuses to reconsider its decisions or procedures, *or has stated a categorical rule to apply in a group of cases*, rendering exhaustion futile, requiring the protesting party to pursue administrative remedies would not further such interests as allowing the agency to correct its own errors and to develop a record for judicial review." *Boulter v. Noble Energy, Inc.*, 521 F. Supp. 3d 1077, 1084 (D. Colo. 2021) (citing *United Air*, 8 P. 3d at 1213) (emphasis added).

5. With respect to the futility showing, the Court stated:

"The Plaintiffs' futility argument asks the Court to presume how the Commission would categorize and resolve Claims which on their face do not clearly raise a bona fide contract dispute. Thus, the Plaintiffs' futility defense asks this Court to improperly interfere with the Commission's autonomy."

Op., at p. 13.

6. However, as outlined in the Reconsideration Motion, the Commission has expressly stated that it does not have the authority to grant the relief requested by the Plaintiffs. *See* Reconsideration Motion, at ¶ 4; *see also Hearings and Applications Process Guidebook*, COLO. OIL & GAS CONSERVATION COMM'N (Jan. 14, 2021) (the "*Guidebook*," attached to the Reconsideration Motion as Exhibit A), at p. 7. The Guidebook makes clear that, with respect to

COLO. REV. STAT. § 34-60-118.5(5.5), the exhaustion requirement at issue, the Commission has adopted the following categorical rule:

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*.

Id.

7. As stated in their Amended Complaint, Plaintiffs have alleged numerous causes of action arising out of their leases with the Defendant. And as mentioned above, the Commission has stated on unequivocal terms that it will not resolve this dispute. Accordingly, it cannot be said that allowing this action to proceed would in any way improperly interfere with the Commission's autonomy.

III. The Response Misrepresents the Requisite Legal Basis for the Motion.

8. The Defendant's attempt to discount the legal basis for the Reconsideration Motion is nothing more than misplaced criticism upon the Plaintiffs. For example, the Response criticizes Plaintiffs for failing to discuss the June 3, 2021 appeal from the Commission ("*Airport Land*") in its briefing on the subject motion to dismiss. By April 12, 2021, however, briefing on the motion to dismiss was completed and the matter was ripe for hearing. Plaintiffs, of course, are not omniscient. Accordingly, the *Airport Lands* opinion does represent an intervening change in law for which this Court may consider in deciding whether to reconsider its opinion.

9. With respect to the *Guidebook* update, its existence and public knowledge of its existence are two separate things. The Commission does not have an avenue upon which to broadcast such an update to the public. Its very recent discovery by Plaintiffs was not for lack of reasonable diligence on their part. It can only be found by navigating from the Commission's website (<https://cogcc.state.co.us/#/home>) as follows:



10. Colorado landowners, such as Plaintiffs, have been subject to the same error by courts on numerous occasions, resulting in losses to judicial efficiency, agency resources, and party resources. Dismissal from this Court will only add legal costs for both parties, result in a futile process before the Commission that will unnecessarily drain its already limited resources, and require the parties to start anew in a courtroom (whether this Court or a Colorado district court has yet to be determined).

CONCLUSION

WHEREFORE, for the foregoing reasons, the Plaintiffs respectfully request that this Court enter an order reconsidering its Order and denying Extraction's Motion.

Dated: October 27, 2021
Wilmington, Delaware

Respectfully submitted,

/s/ Maria Aprile Sawczuk

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