

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

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Plaintiff Hi-Crush Permian Sand LLC (“***Hi-Crush***”) files this Motion to Dismiss Defendant EOG Resources, Inc.’s Counterclaim [ECF No. 45] (“Counterclaim”) seeking dismissal of the Counterclaim asserted by EOG Resources, Inc (“***EOG***”), pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rules of Bankruptcy Procedure 7012(b), and would respectfully show the Court as follows:

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I. INTRODUCTION

EOG asserts a counterclaim against Hi-Crush seeking a “Declaratory Judgment that EOG is Entitled to Fees and Costs as the Prevailing Party” pursuant to Section 17 of the Sand Purchase Agreement (“**SPA**”).² But this Court has already ruled that a request for declaratory judgment awarding attorney’s fees under Section 17 of the SPA is duplicative of Hi-Crush’s breach of contract claim and, therefore, subject to dismissal. Moreover, a claim for attorneys’ fees is not a separate cause of action. Therefore, EOG fails to state a claim for relief as required by Federal Rule of Civil Procedure 12(b)(6), and EOG’s counterclaim for attorney’s fees should be dismissed.

II. FACTUAL BACKGROUND

On February 13, 2017,³ Permian Basin Sand Company, LLC and EOG entered into the SPA.⁴ Weeks later, Hi-Crush acquired Permian Basin Sand Company, LLC, succeeding to its rights under the SPA.⁵ On June 27, 2020, EOG sent Hi-Crush a notice of immediate termination of the SPA pursuant to Section 7(b) of the SPA.⁶ On November 20, 2020, Hi-Crush initiated this adversary proceeding against EOG based on EOG’s termination of the SPA. Section 17 of the SPA states that, “[i]n the event of a dispute between the Parties that results in litigation, the prevailing Party shall be entitled to an award of reasonable attorneys’ fees and costs.”⁷

On January 7, 2021, Hi-Crush filed its First Amended Complaint (“**Complaint**”) asserting three causes of action against EOG: (1) “Declaratory Judgment that EOG’s Purported Termination Under Section 7(b) [of the SPA] Was Invalid;” (2) Breach of Contract; and (3) Avoidance of

² Counterclaim ¶ 7.

³ As this Court is already familiar with the facts of this case, Hi-Crush will limit its discussion of the facts to just those that are central to the Court’s ruling on this Motion. Hi-Crush incorporates by reference the facts as pleaded in Hi-Crush’s First Amended Complaint [ECF No. 14] and Hi-Crush’s Response in Opposition to EOG Resources, Inc.’s Motion to Dismiss [ECF No. 26].

⁴ Compl. ¶ 14; *see also* Compl. Ex. 1 (SPA).

⁵ *Id.* at ¶ 15.

⁶ *Id.* at ¶ 28.

⁷ Compl., Ex. 1 (SPA).

Constructive Fraudulent Transfer. In Count I of the Complaint, Hi-Crush sought a declaratory judgment holding that EOG had no right to terminate the SPA, and, in part, awarding attorney's fees to Hi-Crush under Section 17 of the SPA, as the prevailing party.⁸ On the same grounds, Hi-Crush also sought attorney's fees as an element of damages if the Court rules in its favor on its breach of contract claim.

On January 29, 2021, EOG moved to dismiss the Complaint (*"EOG's Motion"*), arguing that Hi-Crush's declaratory judgment action failed because it was duplicative of its breach of contract claim.⁹ EOG also argued that the claim for attorneys' fees should be dismissed, because "EOG could not have breached the [SPA] when it acted in compliance with its termination provisions" and therefore, "Hi-Crush cannot be a prevailing party on [the breach of contract] claim."¹⁰

On March 30, 2021, the Court heard oral argument on EOG's Motion. Ruling from the bench, the Court agreed that the declaratory judgment claim was partially duplicative, and granted EOG's Motion with respect to ¶¶ 46(i)¹¹ and 46(v)¹² of the Complaint¹³ because "[w]ith respect to .1 and .5, is - - that is a determination of who's right or wrong with respect to the underlying claims."¹⁴ The Court denied EOG's Motion with respect to Hi-Crush's request for attorneys' fees under the breach of contract action¹⁵ because

⁸ Compl. ¶¶ 45, 46(i) and (v).

⁹ EOG's Motion [ECF No. 18] at 16-17.

¹⁰ *Id.* at 18.

¹¹ "EOG's attempted termination of the Sand Purchase Agreement under Section 7(b) was invalid." Compl. ¶ 46(i).

¹² "Hi-Crush is entitled to its reasonable attorneys' fees and costs as provided for under Section 37.009 of the Texas Civil Practice and Remedies Code, and reasonable attorneys' fees and costs as provided for by Section 17 of the Sand Purchase Agreement." Compl. ¶ 46(v).

¹³ EOG moved for dismissal of Hi-Crush's declaratory judgment claim in its entirety, but the Court denied EOG's motion with respect to ¶¶ 46(ii)-(iv) of the Complaint.

¹⁴ Transcript of Motion to Dismiss Hearing ("Hearing Transcript") [ECF No. 41] at 42:3-5.

¹⁵ With respect to the breach of contract action, Hi-Crush sought attorneys' fees as a remedy if it were to be the prevailing party and did not assert a separate cause of action for attorneys' fees. As discussed further herein, Texas law does not recognize a request for attorneys' fees as a separate cause of action.

I don't consider that to be a separate claim . . . if there is a breach of contract claim - - I mean, that's kind of the remedy . . . it's not asserting, I guess, separate claim for a tort [sic] or breach of contract or that sort of thing. It's an entitlement if you proceed upon or if you prevail on a particular claim and the provision for the attorney's fees exists, either by contract or by law.¹⁶

Here, as with Hi-Crush's declaratory judgment claim, EOG's claim for declaratory judgment is duplicative of Hi-Crush's underlying breach of contract claim. Moreover, EOG's claim for attorney's fees is not, in itself, a viable cause of action. Therefore, the Court should dismiss the Counterclaim.

III. LEGAL STANDARD

To survive a Rule 12(b)(6) motion, EOG must allege sufficient facts that, if accepted as true, state a claim for relief that is plausible on its face.¹⁷ "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."¹⁸ Accordingly, a complaint must contain a short and plain statement of the claim that provides the defendant with fair notice of what each claim is and the grounds upon which it rests.¹⁹ A pleading based on "labels and conclusions," "formulaic recitation of the elements of a cause of action," or "naked assertions devoid of further factual enhancement" will not suffice.²⁰ The Court is "not bound to accept as true a legal conclusion couched as a factual allegation."²¹

¹⁶ Hearing Transcript 80:17-81:8.

¹⁷ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also* FED. R. CIV. P. 8(a)(2).

¹⁸ *Id.*

¹⁹ *See* Fed. R. Civ. P. 8(a)(2).

²⁰ *Iqbal*, 556 U.S. at 678 (2009); *see also* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

²¹ *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Iqbal*, 556 U.S. at 678 (explaining that merely conclusory allegations are "not entitled to be assumed true").

IV. ARGUMENT AND AUTHORITIES

A. **EOG’s Counterclaim for declaratory judgment should be dismissed because it is duplicative of Hi-Crush’s breach of contract claim.**

EOG’s Counterclaim seeks a declaratory judgment that EOG “is the ‘prevailing Party’ in this litigation pursuant to section 17 of the SPA and that it is entitled to an award of reasonable attorneys’ fees and costs.”²² But any finding that EOG is the prevailing Party or any entitlement to attorneys’ fees pursuant to Section 17 of the SPA must, necessarily, turn on a finding with respect to Hi-Crush’s breach of contract claim. Thus, as this Court already concluded when considering EOG’s motion to dismiss, a claim for declaratory judgment concerning whether EOG or Hi-Crush is the “prevailing Party” (and therefore entitled to attorney’s fees) is duplicative and subject to dismissal.

As EOG recognized when it moved to dismiss Hi-Crush’s declaratory judgment action for attorney’s fees, courts in the Fifth Circuit “regularly reject declaratory judgment claims that seek resolution of matters that will already be resolved as part of the claims in the lawsuit.”²³ Moreover, “[i]f a request for a declaratory judgment adds nothing to an existing lawsuit, it need not be permitted.”²⁴ “Thus, redundant declaratory judgment claims will not survive a Rule 12(b)(6) motion.”²⁵ Further, a “[d]efendants’ interest in recovering attorney’s fees does not justify an exception to the well-established principle that declaratory judgment claims that seek resolution of matters already before the court are subject to dismissal.”²⁶

²² Counterclaim ¶ 7.

²³ *Bowman v. Bella Estancias, LLC*, No. 3:17-cv-0091-KC, 2018 WL 1115202, at * 3 (W.D. Tex. Feb. 15, 2018) (collecting cases for the proposition that declaratory judgment claims may be dismissed where the claim is “unnecessary because Plaintiff has already placed the issues relevant to Defendant’s counterclaim before the Court”) (internal citations and quotations omitted).

²⁴ *Id.*

²⁵ *Merritt Hawkins & Associates, LLC v. Gresham*, No. 3:13-cv-00312-P, 2014 WL 685557, at * 3 (N.D. Tex. Feb. 21, 2014)

²⁶ *Bowman*, 2018 WL 1115202 at * 4 (dismissing defendants counterclaims for declaratory judgment because “[d]efendants offer no other justification for retaining their counterclaims for declaratory judgment, apart from their interest in recovering attorney’s fees.”); see also *Merritt Hawkins & Associates, LLC*, 2014 WL 685557 at * 4, n.2

In *Merritt Hawkins*, plaintiff asserted a breach of contract claim against defendant. Defendant asserted a counterclaim against plaintiff seeking a declaratory judgment that the contract was unenforceable. The court determined that both claims required the court to determine the validity and enforceability of the contract.²⁷ Thus, because defendant's counterclaim "merely [sought] declaratory judgment on issues already pending before the Court," (i.e. the enforceability of the contract) the court dismissed the counterclaim holding that "[d]efendants' counterclaims must raise an issue that goes beyond the scope of [p]laintiff's pending claim."²⁸

In *Bowman*, defendants conceded that the counterclaims they asserted against plaintiff "will already be resolved as part of the claims in the lawsuit."²⁹ Nevertheless, defendants argued that their counterclaims were material to their right to recover attorneys' fees.³⁰ The court found that the counterclaims sought "resolution of matters that will already be resolved as part of the claims in the lawsuit, and therefore add nothing to this suit."³¹ Accordingly, the court dismissed defendants' counterclaims holding that an interest in recovering attorneys' fees "does not establish a sufficient basis for the Court to entertain counterclaims for declaratory judgment on issues that are already before the court."³²

Here, as in *Merritt Hawkins* and *Bowman*, the Counterclaim is entirely premised on a finding by this Court as to whether EOG breached the SPA.³³ Whether EOG breached the SPA is the very question at issue in Hi-Crush's breach of contract claim. Therefore, the Counterclaim

("The prevailing party will recover attorneys' fees in the underlying claim, so a counterclaim for attorneys' fees adds nothing.")

²⁷ *Merritt Hawkins & Associates, LLC*, 2014 WL 685557 at *3.

²⁸ *Id.*

²⁹ *Bowman*, 2018 WL 1115202 at * 4.

³⁰ *Id.*

³¹ *Id.* (internal citations and quotations omitted).

³² *Id.*

³³ Counterclaim ¶ 7.

“adds nothing”³⁴ to the existing lawsuit. Moreover, this Court has already concluded that an action for declaratory judgment seeking attorneys’ fees under Section 17 of the SPA is duplicative of Hi-Crush’s breach of contract claim.³⁵

Therefore, the Counterclaim should be dismissed because it is duplicative of Hi-Crush’s breach of contract claim, and EOG should not be permitted to assert the flip-side of the declaratory judgment request that the Court dismissed (on EOG’s motion) from Hi-Crush’s Complaint.

B. The Counterclaim should be dismissed because it is not a viable cause of action.

The Counterclaim is also subject to dismissal because a request for attorneys’ fees is not, in itself, an independent cause of action.

Numerous courts, including this one, have held that “attorney fees themselves are not a separate cause of action.”³⁶

Nowhere does Texas law impose an additional requirement that a plaintiff must separately assert a claim for attorney’s fees in this context. To the contrary, a claim for attorneys’ fees for breach of contract is not an independent cause of action, and need not be asserted as such, because recovery of attorneys’ fees for breach of a contract is a substantive, not a procedural, issue and will be governed by the law governing the substantive issues.³⁷

³⁴ *Bowman*, 2018 WL 1115202 at * 3; *Merritt Hawkins & Associates, LLC*, 2014 WL 685557 at * 3.

³⁵ Hearing Transcript at 79:15-16.

³⁶ *Sandoz Inc. v. M & S Pharmacy, Inc.*, No. 9:19-CV-232-RC-ZJH, 2020 WL 8172719, at *4 (E.D. Tex. Dec. 21, 2020), *report and recommendation adopted*, No. 9:19-CV-232-RC-ZJH, 2021 WL 121164 (E.D. Tex. Jan. 13, 2021); *Guardado v. Deutsche Bank Nat’l Tr. Co. as Tr. for Registered Holders of Long Beach Mortg. Loan Tr. 2006-4, Asset-Backed Certificates, Series 2006-4*, No. EP-18-CV-368-DB, 2019 WL 7761811, at *7 (W.D. Tex. Aug. 30, 2019) (“It is unclear whether Plaintiffs request declaratory judgment, an injunction, and attorney’s fees as forms of relief or whether Plaintiffs seek to pursue these as independent causes of action. See Compl. 27–29, ECF No. 1-4. To the extent that Plaintiffs seek to pursue these as independent causes of action under Texas law, their claims fail and must be dismissed because they are merely forms of relief.”); *Seddiq v. Fed. Nat’l Mortg. Ass’n*, No. CV H-16-3326, 2017 WL 3189021, at *4 (S.D. Tex. July 27, 2017) (“Fannie Mae seeks dismissal of Seddiq’s requests for quiet title, declaratory judgment, injunctive relief, and attorney’s fees. Dkt. 5. The court does not view these as causes of action; it views them as remedies. As such, the court will make a determination with regard to these remedies upon the adjudication of the underlying constitutional claim.”); *see also* Hearing Transcript at 80:16-81:12 (“With respect to the attorney’s fees . . . I don’t consider that to be a separate claim . . . that’s kind of the remedy . . . if I find that there’s been a breach of contract.” “It’s an entitlement if you proceed upon or if you prevail on a particular claim and the provision for the attorney’s fees exists, either by contract or by law.”).

³⁷ *Gilmour v. Blue Cross & Blue Shield of Alabama*, No. 4:19-CV-160, 2020 WL 2813197, at *23 (E.D. Tex. May 29, 2020), *order vacated in part on reconsideration sub nom. Gilmour, Tr. for Grantor Trusts of Victory Med. Ctr. Craig Ranch, LP v. Blue Cross & Blue Shield of Alabama*, No. 4:19-CV-160-SDJ, 2021 WL 1196272 (E.D. Tex. Mar. 30, 2021) (vacated on other grounds, but dismissing claim for attorney’s fees because it is not a separate cause

Rather,

The Fifth Circuit has explained that, “to be entitled to attorneys’ fees, a party must (1) request attorneys’ fees in its pleadings and (2) file a timely motion for attorneys’ fees under Rule 54(d)(2) within fourteen days after the entry of final judgment.” A fee award under Rule 54, then, does not require a party to also assert a claim for attorney’s fees.³⁸

EOG’s rights to recover attorneys’ fees, if any, are governed by the terms of Section 17 of the SPA, and is premised on a finding by this Court that EOG is the prevailing party at the conclusion of the case. EOG does not, and cannot, assert an independent basis for attorneys’ fees. Indeed, this Court has already held that the claim for attorneys’ fees pursuant to Section 17 of the SPA is not a “separate claim for a torte [sic] or breach of contract or that sort of thing.”³⁹ Rather, it is “an entitlement if you proceed upon or if you prevail on a particular claim and the provision for the attorney’s fees exists, either by contract or by law.”⁴⁰

If this Court ultimately concludes that EOG is the “prevailing Party” pursuant to Section 17 of the SPA, EOG may seek to recover any attorneys’ fees to which it may be entitled by filing a motion under Fed. R. Civ. P. 54(d)(2),⁴¹ but a counterclaim seeking attorney’s fees is not a viable cause of action and should be dismissed.

V. CONCLUSION

The Counterclaim fails to state a cause of action upon which relief can be granted and therefore is subject to dismissal. Not only is the Counterclaim duplicative of Hi-Crush’s breach

of action and any right to attorneys’ fees had already been sufficiently asserted in the pleadings to later support a motion for attorneys’ fees under Fed. R. Civ. P. 54(d)(2)).

³⁸ *Gilmour*, 2020 WL 2813197, at *23 (quoting *Romaguera v. Gegenheimer*, 162 F.3d 893, 895 (5th Cir. 1998) (per curiam)).

³⁹ Hearing Transcript at 81:4-6; *see also Sandoz Inc.*, 2020 WL 8172719, at *4; *Guardado*, 2019 WL 7761811, at *7; *Seddiq*, 2017 WL 3189021, at *4.

⁴⁰ Hearing Transcript at 81:6-8.

⁴¹ *Romaguera*, 162 F.3d at 895 (5th Cir. 1998); *Gilmour*, 2020 WL 2813197, at *23. For the avoidance of doubt, Hi-Crush reserves all rights to challenge EOG’s ability to recover attorney’s fees on a contract EOG allegedly terminated, and it does not concede that EOG would be entitled to attorney’s fees under Rule 54.

of contract claim, it is also not a viable cause of action under Texas Law. Moreover, this Court already concluded as much when ruling on EOG's Motion. Further, because amendment will not cure the deficiencies in the Counterclaim, dismissal should be with prejudice.⁴²

⁴² *Id.* at 79:17-19 ("I am going to find that there is nothing that could be done to replead in that the dec action such that I am required to give the plaintiff an opportunity to replead.").

Dated: May 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 4, 2021, a true and correct copy of the foregoing document was served (i) by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas on those parties registered to receive electronic notices; and (ii) via electronic mail on counsel for EOG, Sarah Link Schultz, David F. Staber, and Laura Warrick at sschultz@akingump.com, dstaber@akingump.com, and lwarrick@akingump.com.

/s/ Joseph W. Buoni
Joseph W. Buoni

district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and after due deliberation, it is
HEREBY ORDERED THAT:

1. The Motion to Dismiss is **GRANTED**. EOG's Counterclaim for Declaratory Judgment [ECF No. 45] is dismissed with prejudice.

2. Nothing in this Order shall be interpreted as precluding Defendant EOG Resources, Inc. from seeking attorneys' fees in this adversary proceeding pursuant to Section 17 of the Sand Purchase Agreement if it is the prevailing party.

3. This Court shall retain exclusive jurisdiction to resolve any dispute arising from or related to this Order.

Signed: _____, 2021

DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE