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COUNSEL TO THE DEBTORS

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	Chapter 11
	§	
ROCKIES REGION 2006 LIMITED	§	Case No. 18-33513-sgj-11
PARTNERSHIP and ROCKIES REGION	§	
2007 LIMITED PARTNERSHIP,[1]	§	(Jointly Administered)
	§	
Debtors.	§	

DEBTORS' OBJECTION TO
MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Rockies Region 2006 Limited Partnership and Rockies Region 2007 Limited Partnership (collectively, the "Debtors"), for their Objection (the "Objection") to the *Motion to Compel*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: Rockies Region 2006 Limited Partnership (9573) and Rockies Region 2007 Limited Partnership (8835).

Production of Documents [Docket No. 171] (the "Motion to Compel") filed by the LP Plaintiffs,[2] respectfully represent:

PRELIMINARY STATEMENT

1. Unsatisfied with this Court's ruling on the Debtors' Motion to Exclude (defined below), the LP Plaintiffs attempt to circumvent that ruling by seeking an order requiring the Debtors to respond to unnecessary and inappropriate discovery requests and to disclose information that not only fits squarely within the definitions of attorney-client privilege and attorney work product, but which is irrelevant to the Pending Motions (defined below).

2. Specifically, the LP Plaintiffs sent out three rounds of discovery to the Debtors and/or their professionals, collectively comprised of 147 requests for production (collectively, the "Discovery Requests"). On Friday, May 24, 2019, counsel for the Debtors conferred with counsel for the LP Plaintiffs regarding their respective discovery issues (the "May 24 Conference"). After the May 24 Conference, the Debtors and the LP Plaintiffs entered a written agreement to "address[] certain objections asserted by the LP Plaintiffs and Debtors in response to requests for production of documents served by the other party" (the "Discovery Agreement"). The LP Plaintiffs signed the Discovery Agreement twenty minutes after they filed the Motion to Compel.

3. The May 24 Conference and the Discovery Agreement, discussed more fully below and herein, resolve or moot the majority of the LP Plaintiffs' complaints in the Motion to Compel. The remainder of the Motion to Compel fails on multiple fronts.

[2] The LP Plaintiffs are (i) Robert R. Dufresne, as Trustee of the Dufresne Family Trust; (ii) Michael A. Gaffey, as Trustee of the Michael A. Gaffey and JoAnne M. Gaffey Living Trust dated March 2000; (iii) Ronald Glickman, as Trustee of the Glickman Family Trust established August 29,1994; (iv) Jeffrey R. Schulein, as Trustee of the Schulein Family Trust established March 29, 1989; and (v) William J. McDonald as Trustee of the William J. McDonald and Judith A. McDonald Living Trust dated April 16, 1991.

4. *First*, the LP Plaintiffs' Motion to Compel is wholly incorrect regarding the existence, breadth, application, and waiver of both the attorney-client privilege and work-product doctrine. The LP Plaintiffs take the untenable position that they are entitled to discovery of all of the communications between the Debtors' Responsible Party, Karen Nicolaou, and counsel to the Debtors, Gray Reed & McGraw, LLP ("Gray Reed"). The LP Plaintiffs' demand for the disclosure of documents and communications covered by the attorney-client privilege — which has never been waived by the Debtors — and the work-product (including core work product) of Gray Reed related to this matter is unwarranted.

5. *Second*, much of the discovery sought by the LP Plaintiffs relates to the alleged damages associated with the derivative claims asserted in the Colorado Action (defined below) — information that is not relevant to the Pending Motions (defined below), as recognized by this Court during the hearing on the Motion to Exclude.[3]

6. *Finally*, the LP Plaintiffs conflate providing legal advice that can be applied to business matters with providing pure business advice. Commercial attorneys, however, are hired precisely to provide legal advice that business professionals can utilize when making decisions in exercise of their business judgment. Providing such legal guidance does not render the communications non-privileged business (as opposed to legal) advice, and does not result in a waiver of the attorney-client privilege.

7. Furthermore, as admitted by the LP Plaintiffs in the Motion to Compel, to date, the Debtors have produced approximately 6,300 pages of documents in response to the LP Plaintiffs' 147 document requests and through due diligence. The Debtors' efforts in this case have been

[3] Motion to Exclude Hr'g Tr. 29:1-5.

neither obstructionist nor in bad faith. Rather, the Debtors have repeatedly attempted to cooperate with the LP Plaintiffs as evidenced by the Discovery Agreement.

8. For the reasons stated above and as discussed further herein, the Debtors respectfully request that the Court deny the Motion to Compel.

BACKGROUND

9. On October 30, 2018 (the "Petition Date"), each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

10. The Debtors are continuing to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or official committee has been appointed.

11. The Debtors are West Virginia limited partnerships that own undivided working interests in oil and natural gas wells. PDC Energy, Inc. (f/k/a Petroleum Development Corp.) ("PDC") is the managing general partner of each of the Debtors and owns approximately 39% of the Debtors' equity interests. In the aggregate, the Debtors have over 3,700 limited partnership unit holders (the "Investor Partners"). Additional background information may be found in the *Declaration of Karen Nicolaou in Support of Chapter 11 Petitions* [Docket No. 10] (the "Nicolaou Declaration").

12. Presently before the Court are the LP Plaintiffs' *Amended Motion for Dismissal of Chapter 11 Case* [Docket No. 140] (the "Motion to Dismiss") and the *Application for Order (i) Authorizing the Retention of Harney Management Partners to Provide the Debtors a Responsible Party and Certain Additional Personnel, (ii) Designating Karen Nicolaou as Responsible Party for the Debtors Effective as of the Petition Date, and (iii) Granting Related Relief* [Docket No. 12] (the "Harney Application" and together with the Motion to Dismiss, the "Pending Matters"), which have been set for hearing on June 20 and 21, 2019.

13. The LP Plaintiffs contend that cause exists to dismiss these cases under section 1112(b) of the Bankruptcy Code because the Debtors: (i) commenced these chapter 11 cases in bad faith; and (ii) were not authorized to file bankruptcy in accordance with the limited partnership agreements and applicable West Virginia law. As set forth more fully in the *Debtors' Objection to Motion for Dismissal of Chapter 11 Case* [Docket No. 141] (the "Response to the Motion to Dismiss"), the Debtors vehemently dispute the allegations in the Motion to Dismiss.

14. In support of their position that this is a bad faith filing, the LP Plaintiffs make the following allegations: (i) these chapter 11 cases were filed as a litigation tactic and for the purpose of compromising the claims in the lawsuit filed against PDC in the United States District Court for the District of Colorado captioned *Dufresne, et al. v. PDC Energy, Inc., et al.*, Case No. 1:17-cv-03079-RBJ (the "Colorado Action") for the benefit of PDC; (ii) PDC is an insider of the Debtors and is the only creditor that could have pressured the Debtors to file chapter 11; (iii) there was no pressure from external creditors to file bankruptcy; (iv) no Investor Partners were consulted prior to the filing; (v) the Debtors are solvent when PDC's assets are considered; (vi) this is a two-party dispute between PDC and the Investor Partners; (vii) the venue of these chapter 11 cases demonstrates that these cases are intended as takeovers by PDC; (viii) the Debtors' proposed plan is unconfirmable and is further evidence of PDC's litigation strategy; and (ix) the Debtors have sought to limit notice on the Investor Partners in order to eliminate their participation in these chapter 11 cases.

15. The LP Plaintiffs also make the following allegations in connection with their position that these were unauthorized filings and that Ms. Nicolaou was not authorized to file these cases: (i) PDC did not have the authority to file bankruptcy for the Debtors under either the partnership agreements or West Virginia law because PDC failed to obtain consent from a majority

of the Investor Partners; and (ii) Ms. Nicolaou did not have authority to file the petitions because PDC could not delegate its duties and responsibilities owed to the Debtors to a third party.

16. Thus, the matters at issue are only whether (a) the Debtors commenced these chapter 11 cases in bad faith, (b) the Debtors were authorized to file bankruptcy in accordance with the limited partnership agreements and applicable West Virginia law, and (c) PDC was authorized to hire Ms. Nicolaou as the Debtors' Responsible Party.

17. On May 17, 2019, the Court granted the Debtors' *Emergency Motion to (i) Exclude Expert Report and Testimony of Edwin C. Mortiz, (ii) Exclude Portions of Expert Report and Testimony of Gregory E. Scheig, and (iii) Limit Scope of Evidence for Hearing on Motion to Dismiss* (the "Motion to Exclude") on the grounds that the valuation of the Debtors' assets, including the alleged damages associated with the claims asserted in the Colorado Action, is irrelevant to the above-listed issues.

THE MAY 24 CONFERENCE & DISCOVERY AGREEMENT

18. As discussed above, counsel for the LP Plaintiffs and counsel for the Debtors held a telephone conference on May 24, 2019 to discuss the issues raised in the Motion to Compel. As a result of the May 24 Conference, the parties entered into the Discovery Agreement.

19. The Discovery Agreement memorializes that neither party has withheld from production, nor will withhold from future productions, any non-privileged documents that are otherwise responsive to requests as to which objections were asserted and followed by a statement that subject to such objections, any non-privileged, responsive documents would be produced. Thus, the Discovery Agreement was expressly intended to resolve many of the concerns outlined in the Motion to Compel. The Discovery Agreement is attached hereto as **Exhibit A**.

20. Specifically, the Discovery Agreement was intended to resolve three distinct sections of the Motion to Compel: LP Plaintiffs' objections to (a) boilerplate objections in each of the Debtors' responses to the Discovery Requests (the "Discovery Responses"); (b) the Debtors' alleged failure to comply with Federal Rule of Civil Procedure 34(b)(2)(C); and (c) the Debtors' specific objections. Motion to Compel at pp. 11-15, 24-25.

21. Additionally, at the May 24 Conference, notwithstanding that the Debtors' privilege log fully satisfies the requirements of the Federal Rules of Civil Procedure, as detailed below, the Debtors agreed to amend their privilege log in an effort to provide the LP Plaintiffs with further information and in order to resolve all present objections to the log. Despite that agreement, the LP Plaintiffs have not retracted their objections to the Debtors' privilege log outlined in the Motion to Compel. Given the Debtors' agreement to amend their privilege log, the LP Plaintiffs' objection on this point is not ripe, and the Court should allow the agreed amendment to occur before any complaints regarding the privilege log are addressed. *See e.g., Millennium Labs., Inc. v. Darwin Select Ins. Co.*, No. 14-CV-295, 2014 WL 7331743, at *1 (S.D. Cal. Dec. 18, 2014).

22. Apparently, the LP Plaintiffs have chosen to disregard the May 24 Conference and Discovery Agreement and filed the Motion to Compel just twenty minutes before returning a countersigned version of the Discovery Agreement to the Debtors.[4] In the abundance of caution, Debtors will address each complaint raised in the Motion to Compel, even though Debtors contend the Discovery Agreement and the agreement to amend Debtors' privilege log resolve many of those complaints.

[4] Attached hereto as **Exhibit B** is a copy of the email from counsel for the LP Plaintiffs, returning a signed copy of the Discovery Agreement to Debtors' counsel at 4:53 pm. The Motion to Compel was filed at 4:36 pm. *See* Docket No. 171.

OBJECTION

A. Standards for Compelling Discovery

23. The Court may impose limits on discovery, including "forbidding" requested discovery to prevent duplicative, unnecessary, or inefficient requests, and "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1). The Court may "exercise its sound discretion to restrict what materials are obtainable, how they can be obtained, and what use can be made of them once obtained" in discovery. *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 684 (5th Cir. 1985); *see also Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1394 (5th Cir. 1994) (affirming district court's grant of protective order concerning overly broad requests that would subject defendant to "undue burden, expense, and annoyance"); *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990) ("[D]iscovery is not justified when cost and inconvenience will be the sole result.").

24. Furthermore, under Rule 26, made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 7026, a court ***must***:

> limit proposed discovery that it determines is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit—and the court must do so even in the absence of a motion.

Orchestratehr, Inc. v. Trombetta, 178 F.Supp.3d 476, 505 (N.D. Tex. 2016); *see* FED. R. CIV. P. 26.

B. Debtors' General Objections are Adequately Supplemented by Specific Objections

25. As a preliminary matter, the Discovery Agreement clarifies that the Debtors have not withheld any non-privileged responsive documents, notwithstanding any objections to the

various Discovery Requests. Thus, any concerns the LP Plaintiffs have with regard to the "general" nature of objections in the Discovery Responses have been resolved and are moot.

26. In the interests of completeness, however, and to the extent the LP Plaintiffs argue that the Discovery Agreement does not resolve concerns over the "general" objections in the Discovery Responses, the Debtors' objections to the Discovery Responses are proper and should be sustained.

27. Generally, objections must be made with specificity and, thus, the Debtors provided specific objections, with explanation, in their Discovery Responses. For example, in their First Discovery Response, the Debtors objected as follows:

> **REQUEST FOR PRODUCTION NO. 75:** All Communications from Graves relating to, referring to and/or concerning the value of the Partnerships' Oil & Gas Properties.
>
> **RESPONSE:** Debtors object to this Request to the extent that it seeks documents and communications beyond the scope of permissible expert discovery as provided in Federal Rule of Civil Procedure 26. Debtors further object to this Request to the extent it seeks documents that are not relevant to the [Pending Matters]. Subject to the foregoing objection, the Debtors will produce responsive, non-privileged documents, relating to Graves' Review and Evaluation of Properties Owned by the Partnership Remaining as of August 1, 2018.

See Discovery Responses, attached to the Motion to Compel at p. 58. Clearly, such request is not appropriate or relevant to the Pending Motions, as indicated by the Debtors in their Discovery Responses. The Debtors made similarly specific objections in their First Discovery Response to Requests 15-18, 21-26, 28, 31-39, 42-49, 52-53, 55-69, 71-75, and 78-84. *See id.* at pp. 46-60. The same holds true for the remainder of the Discovery Responses. *See id.* at pp. 119-28, 135.

28. The broader, introductory objections asserted by the Debtors are simply prefatory in nature and are supplemented by the specific objections to each request. Thus, concerns of "Rambo Tactics" referenced by the LP Plaintiffs are wholly unfounded. *See* Motion to Compel at

p. 11 ¶ 20. The LP Plaintiffs are fully able to ascertain the rationale and justification behind each specific objection. It should be noted that the LP Plaintiffs included a series of "general objections" in their discovery responses that are similar to those about which they now complain.

29. Furthermore, the preferred remedy in this Circuit for a failure to appropriately object to discovery, such as specificity of objections, is an opportunity to amend, not the drastic remedy of waiver. *See Cashman Equip. Corp. v. Rozel Operating Co.*, No. 08-363-C-M2, 2009 WL 2487984, at *2 (M.D. La. Aug. 11, 2009).

C. The Debtors' Responses & the Discovery Agreement Fully Comply with Rule 34

30. This issue was the key focus of and is expressly resolved by the Discovery Agreement. Accordingly, the LP Plaintiffs' objection on this point is moot.

D. The Debtors' Privilege Log is Sufficient in All Respects

31. As discussed *supra,* in the May 24 Conference the Debtors agreed to amend their current privilege log. As such, the LP Plaintiffs' objection on this point is misplaced and not ripe for consideration, and the Court should defer ruling on it at this time. *Millennium Labs.*, 2014 WL 7331743 at *1.

32. Notwithstanding the Debtors' agreement to amend their privilege log, the current privilege log fully satisfies the requirements of the Federal Rules of Civil Procedure. *See, e.g., Mfrs. Collection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 2558888, at *4–5 (N.D. Tex. June 6, 2014).

33. The Debtors' current privilege log consists exclusively of correspondence and documents exchanged by and between Ms. Nicolaou and Gray Reed. *See* Debtors' Privilege Log, attached to the Motion to Compel at pp. 61-91. The log asserts attorney-client and work-product privileges over each of the documents listed, and describes each communication as a confidential

email or document "prepared by or at the direction of counsel in relation to legal services provided." *See id.*

34. The Motion to Compel argues the log is insufficient because it only "contains the date, transmitter and recipient of the communications and documents" but fails to "provide an adequate description of the items" to allow LP Plaintiffs to determine if they are satisfied that the privileges apply. *See* Motion to Compel at ¶ 29. The LP Plaintiffs' objection is not well founded.

35. LP Plaintiffs' complaint is the *exact* same complaint made by the objecting party in *Precision Airmotive*. *See* 2014 WL 2558888 at *4-5. In that case, the court held that when counsel has already represented that all of the documents on a privilege log are subject to attorney-client or work-product privilege, the ***only information relevant to challenging privilege*** is:

> (1) an identification of the time period encompassed by the withheld documents; (2) a listing of the individuals who were authors or addressees or were copied on the documents; [and] (3) a representation by counsel as to whether all of the documents either (a) were prepared to assist in anticipated or pending litigation or (b) contain information reflecting communications between (i) counsel or counsel's representatives and (ii) the client or the client's representatives, for the purpose of facilitating the rendition of legal services to the client.

Id. at *4 (citing *S.E.C. v. Thrasher*, C.A. No. 92-6987, 1996 WL 125661, at *2 (S.D.N.Y. Mar. 20, 1996)); *see also Games2U, Inc. v. Game Truck Licensing, LLC*, No. MC–13–00053–PHX–GMS, 2013 WL 4046655, at *7 (D. Ariz. Aug. 9, 2013); *United States v. Gericare Med. Supply Inc.*, No. Civ. A. 99–0366–CB–L, 2000 WL 33156442, at *4 (S. D. Ala. Dec. 11, 2000); *In re Imperial Corp. of Am. Related Litig.*, 174 F.R.D. 475, 478 (S.D. Cal. 1997)). That is the ***exact information*** contained in the Debtors' current privilege log and, thus, it is fully sufficient in its present form. *Id.*

36. This result is logical, as Rule 26 requires that a party claiming privilege must describe the nature of privileged documents in a manner that, "***without revealing information***

itself privileged or protected," will allow other parties to assess the applicability of the privilege. FED. R. CIV. P. 26(b)(5)(A)(ii). Accordingly, communications between counsel and a client, made during a time frame relevant to legal services provided by counsel and described as being for the rendition of legal services, supplies all the information a challenging party needs to determine whether the privilege might apply. *Cf. Precision Airmotive*, 2014 WL 2558888, at *4-5. Since the very substance of the communications is privileged, describing it would waive the privilege. *Id.*

37. Further, notwithstanding that the privilege log is presently sufficient, were it to be deficient in any manner, the proper remedy would be amend the log — as Debtors have already offered, in good faith, to do — not to order disclosure of the privileged documents. *See Cashman Equip. Corp.*, 2009 WL 2487984, at *2 ("Furthermore, the majority approach by courts, when confronted by a privilege log that is technically deficient and that does not appear to have been prepared in bad faith, is to allow the party who submitted the log a short opportunity to amend the log prior to imposing the drastic remedy of waiver.") (collecting cases); *see also Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007) ("An order that privileged documents be disclosed as a sanction is appropriate, however, only if the party that authored the log has displayed willfulness, bad faith or fault."); 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2016.1 (3d ed.) ("A key point here is that finding a waiver in such situations is a sanction, not an automatic consequence of every failure to comply with Rule 34(b)'s time limit for responding to a discovery request with sufficient detail.").

38. In sum, the current privilege log is sufficient and the Debtors have agreed in good faith to amend the log. As such, the LP Plaintiffs' objection on this point should be overruled in full.

E. All of Gray Reed's Communications to Debtors Relate to Providing Legal Services

39. The LP Plaintiffs assert that to the extent Gray Reed provided business advice to the Debtors, such advice is not covered by the attorney-client privilege. Notwithstanding that the LP Plaintiffs' argument is an incorrect statement of the law on privilege, Gray Reed provided only legal services and related advice to the Debtors.

40. The LP Plaintiffs argue that Gray Reed's services to the Debtors in "evaluating strategic alternatives, a potential wind-down and a ***potential chapter 11 filing***" — all routine services provided by commercial bankruptcy attorneys — are in the nature of business advice and are therefore not privileged. *See* Motion to Compel at p. 18 ¶ 37 (emphasis added). This is incorrect, especially in the context of a bankruptcy filing, which necessarily takes into consideration economic and business factors. *See, e.g. In re McDowell*, 483 B.R. 471, 494 (Bankr. S.D. Tex. 2012) (clarifying that filing of bankruptcy is an onset of litigation and that privilege applies where litigation is not imminent but the "primary motivating purpose" behind a document or communication "was to aid in possible future litigation"); *see also Mattel, Inc. v MGA Entm't, Inc.*, No. CV 04-9049 DOC RNBX, 2010 WL 3705902, at *4 (C.D. Cal. Sept. 22, 2010) ("…even if [attorney] rendered advice that benefited MGA in its business, the [attorney-client] privilege extends to 'legal advice regarding the clients business affairs.'"); *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) (holding that attorney's communications with the client are privileged if regardless of whether "the subject of the advice is criminal or civil, business, tort, domestic relations, or anything else" if "[he] was employed with … reference to his knowledge and discretion in the law, to give the advice.").

41. The LP Plaintiffs rely solely on *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690 (5th Cir. 2017) for their arguments under this section. However, the facts of that case are easily distinguishable from the case at bar.

42. In *BDO USA*, an HR executive filed a claim with the EECO alleging discrimination by BDO, her former employer. *Id.* at 694. BDO claimed that documents between the HR executive and/or other employees and in-house and outside counsel, documents sent with counsel courtesy copied, and documents between non-attorney employees regarding legal advice were subject to the attorney-client privilege. *Id.*

43. The *BDO USA* court explained that communications with an attorney are only covered by the attorney-client privilege when the communication is kept confidential and is sent with an eye toward "obtaining or providing legal assistance." *Id.* at 696 (citing *In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007). Thus, "communications by a corporation with its attorney, who at the time is acting solely in his capacity as a business advisor, are not privileged, nor are documents sent from one corporate officer to another merely because a copy is also sent to counsel." *Id.* (internal citations omitted).

44. Previously, the Fifth Circuit clarified that when an attorney provides both business and legal advice, courts should examine the context of the communication in order to determine the "manifest purpose" of the communication. *Exxon Mobil Corp. v. Hill*, 751 F.3d 379, 382 (5th Cir. 2014); *see also Stoffels v. SBC Commc'ns, Inc.*, 263 F.R.D. 406, 411 (W.D. Tex. 2009) (When determining whether advice by a lawyer is covered by the attorney-client privilege, "the critical inquiry is . . . whether any particular communication facilitated the rendition of predominantly legal advice or services to the client.").

45. Here, unlike in *BDO USA*, Ms. Nicolaou did not consult with in-house counsel. Instead, she hired outside counsel, Gray Reed, to assist her in determining the Debtors' legal options for winding up their businesses. One of those options was filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. All of her communications with Gray Reed (and,

in turn, Gray Reed's communications in response) were made with the clear purpose of obtaining legal advice and services.

46. Followed to its logical conclusion, if the LP Plaintiffs' contention were the law, none of the work conducted by bankruptcy attorneys when counseling clients on their options for liquidating or reorganizing their businesses would be covered by the attorney-client privilege. Indeed, every commercial lawyer provides business advice to his or her clients and thus, if the LP Plaintiffs' theory were correct, *none* of the statements between a commercial lawyer and his or her clients would be privileged if there was not a lawsuit on file. In addition, each commercial lawyer could be called to testify as a fact witness based up his or her representation. This is clearly not the law. *See Chen*, 99 F.3d at 1501 ("A client is entitled to hire a lawyer, and have his secrets kept, for legal advice regarding the client's business affairs.").

47. The LP Plaintiffs' argument that Gray Reed's advice and counsel (which they describe in their own motion as evaluating a potential chapter 11 filing) does not constitute legal advice, is clearly incorrect. Gray Reed's communications with Ms. Nicolaou are fully protected by the attorney-client privilege and the work product doctrine, and are thus protected from discovery.

F. The Debtors have not Waived the Attorney-Client Privilege

48. The LP Plaintiffs argue that Ms. Nicolaou, acting in her capacity as Responsible Party for the Debtors, relied on advice of counsel when determining: (i) the extent of the Debtors' assets, (ii) her authority to file chapter 11 petitions on the Debtors' behalf, (iii) the appropriate venue for these cases, (iv) the section of the Bankruptcy Code under which she should seek retention, (v) an appropriate value for settlement of the Debtors' claims against PDC, (vi) the value of the claims asserted in the Colorado Action, and (vi) defenses to the Motion to Dismiss. Crucially, *none* of these issues are "an element of a legal claim or defense." *See In re Itron, Inc.*,

883 F.3d 553, 558 (5th Cir. 2018) ("[A] client waives the privilege by affirmatively relying on attorney-client communications to support an element of a legal claim or defense—thereby putting those communications 'at issue' in the case."). Instead, these issues merely demonstrate that Ms. Nicolaou consulted counsel and used their legal advice when making business decisions on behalf of the Debtors. The LP Plaintiffs' arguments on this point turn the law on its head and should be rejected by this Court.

49. Here, while Ms. Nicolaou certainly consulted with Gray Reed regarding legal matters related to her retention as the Debtors' Responsible Party, she never relied upon Gray Reed's legal advice to supplant her own her business judgment. *See In re Residential Capital, LLC*, 491 B.R. 63, 70-72 (Bankr. S.D.N.Y. 2013) ("The attorney-client privilege is not waived if the Debtors argued that they sought the advice of counsel, *among other actions*, in an effort to reasonably educate themselves as to the merits of the settlement.").

50. *First*, as discussed in the Response to the Motion to Dismiss, in assessing the value of the Debtors' assets, Ms. Nicolaou, as Responsible Party for the Debtors, performed an extensive review and analysis of relevant information, documents, and data, including financial statements, relevant operating records, reserve reports, well histories, and leases and assignments filed in the property records. Response to Motion to Dismiss at pp. 7-11, 17-18; *see also* Dep. of K. Nicolaou at 34:9-14; 71:8-72:25; 149:14-21; 174:15-175:12; 182:14-183:8; 192:22-197:18, attached hereto as **Exhibit C**. Ms. Nicolaou also visited several of the Debtors' well sites and engaged a third party reserve engineering firm to value the Debtors' wells and update the Debtors' reserve reports. Response to Motion to Dismiss at p. 8; *see also* **Exhibit C** at 69:4-12; 74:5-17. Ultimately, Ms. Nicolaou used all the information she gathered, including legal guidance from Gray Reed, to

determine that filing these chapter 11 cases was in the best interests of the Debtors and would maximize the value of their assets. Dep. of K. Nicolaou at 24:1-13; 24:21-25:5; 192:22-197:18.

51. *Second*, prior to filing the Debtors' bankruptcy petitions, Ms. Nicolaou reviewed the Debtors' Partnership Agreements and consulted with Gray Reed regarding the provisions therein. *Id.* at 25:10-15. However, Ms. Nicolaou ultimately came to her own conclusion regarding her authority to file the petitions. *Id.* at 31:15-18 ("I listened to what [Gray Reed] had to say and made my own decision [regarding my engagement].").

52. *Third*, Ms. Nicolaou requested Gray Reed's assistance in interpreting the venue provisions of the Bankruptcy Code and in determining appropriate venue for these cases. Clearly, such legal advice is precisely why bankruptcy counsel is hired — to help a non-lawyer determine what does or does not comply with the Bankruptcy Code. Ms. Nicolaou used Gray Reed's legal counsel to help her decide where to file these bankruptcy cases, but made the ultimate decision on her own.

53. *Fourth*, Gray Reed provided legal guidance to Ms. Nicolaou regarding her options for seeking employment under the Bankruptcy Code, similar to the legal counsel provided when aiding Ms. Nicolaou in her determination of appropriate venue under the Bankruptcy Code. Again, there can be no doubt that legal counsel regarding a debtor's retention of its professionals is precisely within the scope of common services provided by bankruptcy attorneys.

54. *Fifth and sixth*, Ms. Nicolaou instructed Gray Reed to analyze the relative merits of the claims asserted in the Colorado Action and similarly, the appropriate value of a settlement with PDC. Such services consisted of a legal analysis of (a) whether the claims asserted in the Colorado Action are direct or derivative claims, (b) whether there are valid statute of limitations and other defenses to those claims, (c) the terms of the Partnership Agreements, and (d) the validity

of the LP Plaintiffs' damages theories. Notably, these types of legal services are undoubtedly standard practice for this type of engagement. Ms. Nicolaou also (with this Court's approval) hired a third party to market test the value of the Debtors' assets as another means of analyzing the reasonableness of PDC's settlement proposal. After digesting Gray Reed's legal counsel regarding the above matters and all other information available to her, Ms. Nicolaou determined an appropriate value for settlement with PDC of the claims asserted in the Colorado Action.

55. *Finally*, there are no statements (and indeed, the LP Plaintiffs did not cite to a single line) in the Response to the Motion to Dismiss indicating that Ms. Nicolaou relied solely upon Gray Reed's advice to establish any element of a claim or defense raised in the Motion to Dismiss, as would be required to implicate the sword and shield doctrine of waiver. *See Itron*, 883 F.3d at 558.

56. When making each of the decisions outlined above, Ms. Nicolaou's testimony and the statements in the Response to the Motion to Dismiss illustrate that she and Gray Reed acted entirely within the appropriate bounds of their respective roles. Gray Reed provided bankruptcy legal advice to a business person, and Ms. Nicolaou used that guidance to aid her in determining the best course of action to maximize the Debtors' estates, which in no way waives the attorney-client privilege. *See Residential Capital*, 491 B.R. at 70-72.

G. The Work Product Doctrine Clearly Applies to Pre-petition Legal Opinions and Materials

57. The LP Plaintiffs demand disclosure of documents related to Gray Reed's representation of the Debtors prior to the Petition Date by asserting that the work product privilege does not apply to documents prepared in preparation of a bankruptcy filing because such documents were not prepared "in anticipation of litigation."

58. Again, following this logic to its natural conclusion, if it were the law, would necessarily mean that no opinions formed or materials generated by bankruptcy attorneys prior to the time a bankruptcy petition is filed would be covered by the work product doctrine. In cases where bankruptcy counsel has no expectation that an adversary proceeding will be filed — which occurs in the vast majority of consumer cases — absolutely *none* of the attorney work product would qualify as privileged.

59. Thus, it should come as no surprise that documents prepared in anticipation of bankruptcy qualify as documents prepared in "anticipation of litigation" for purposes of the attorney work product doctrine. *McDowell*, 483 B.R. at 494 ("[T]his Court concludes that the filing of a bankruptcy petition constitutes the filing of a lawsuit; and, therefore, this Court concludes that documents prepared in anticipation of a bankruptcy filing are prepared for litigation. Accordingly, these documents may be protected by the attorney work-product doctrine."); *Tri-State Outdoor Media Grp., Inc. v. Official Comm. of Unsecured Creditors (In re Tri State Outdoor Media Grp., Inc.)*, 283 B.R. 358, 364 (Bankr. M.D. Ga. 2002) (Documents created in anticipation of bankruptcy were created "in anticipation of litigation."); *see In re James*, No. 05-46095-DML-7, 2005 WL 6443631, at *2 (Bankr. N.D. Tex. Oct. 18, 2005) ("[T]he commencement of a bankruptcy case is a legal action."); *Windbrooke Dev. Corp. v. Envtl. Enters., Inc. of Fla.*, 524 F.2d 461, 463 (5th Cir. 1975) ("[T]he Civil Rules are applicable to bankruptcy cases in order that the procedure for bankruptcy cases will conform as nearly as possible to the procedure following in other civil litigation."); *see also Hickman v. Taylo*r, 329 U.S. 495, 511 (1947) (Work product includes "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . . Were such materials open to opposing counsel on mere demand. . .the effect on the legal profession would be demoralizing.

And the interests of the clients and the cause of justice would be poorly served."); *Ries v. Ardinger (In re Adkins Supply, Inc.)*, 555 B.R. 579, 588 (Bankr. N.D. Tex. 2016) (citing *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir.1991)) ("The typical items deserving of such protection are 'a lawyer's research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses' statements.'").

60. Furthermore, the LP Plaintiffs' bald assertion that they have a substantial need for these documents and cannot procure the information contained in these documents without undue hardship falls woefully short of showing compelling circumstances sufficient to justify the disclosure of work product. *See Osherow v. Vann* (*In re Hardwood P-G, Inc.)*, 403 B.R. 445, 465 (Bankr. W.D. Tex. 2009) ("Signature and Adams claim that they have a substantial need for the Reports and that they will suffer undue harm if the Reports are not produced. Saying does not make it so, however, and the mere assertion that life would be easier if only they had access to the Reports is insufficient to qualify for the undue hardship exception to the work product doctrine.").

61. Disclosure of ordinary work product may only be compelled "if the party seeking the materials demonstrates a substantial need for the information and an inability to obtain the substantial equivalent without undue hardship." *S.E.C. v. Brady*, 238 F.R.D. 429, 443 (N.D. Tex. 2006) (citing *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982)). Thus, if the information in the protected documents can be procured through different means, like a deposition, the undue hardship element is not met. *Brady*, 238 F.R.D. at 443.

62. Additionally, the LP Plaintiffs provide no justification for their claim of undue hardship. Indeed, while claiming undue hardship, in the same breath, they admit that the Debtors have produced approximately 6,300 pages of documents responsive to their Discovery Requests and that the LP Plaintiffs "have no insight into" the documents withheld pursuant to the work

product doctrine. Thus, the LP Plaintiffs expect this Court to believe that even though they do not know what these documents are, they are somehow critical to their case.

63. Moreover, the above-detailed law regarding "substantial need" only applies to ordinary work product. Opinion work product requires a higher showing of need that "is nearly an absolute protection of opinion work product." *Id.* The LP Plaintiffs did not even attempt to meet this heightened burden.

64. Thus, the LP Plaintiffs clearly have not met their burden to show circumstances warranting disclosure of work product — whether ordinary or core (opinion) — in the Motion to Compel.

H. The Debtors Specific Objections Should be Sustained

65. Again, as the Discovery Agreement makes clear that no non-privileged documents have been withheld on the basis of an objection, the LP Plaintiffs' argument on this point is moot. *See* **Exhibit A**.

66. Further, in the Discovery Responses, the Debtors provide ample detail regarding their contentions that certain of the LP Plaintiffs' Discovery Requests are vague, overly broad, ambiguous, irrelevant, or lack particularity as explained above. *See supra*, para. 25-29. To the extent the Court considers the objections asserted to any specific request, the Debtors submit that all such objections should be sustained.

WHEREFORE, the Debtors respectfully request that this Court deny the relief sought in the Motion to Compel and grant such other and further relief as may be just and proper.

Respectfully submitted this 28th day of May, 2019.

GRAY REED & McGRAW LLP

By: */s/ Jason S. Brookner*
Jason S. Brookner
Texas Bar No. 24033684
Lydia R. Webb
Texas Bar No. 24083758
Amber M. Carson
Texas Bar No. 24075610
1601 Elm Street, Suite 4600
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-and-

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COUNSEL TO THE DEBTORS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of May, 2019, he caused a true and correct copy of the foregoing document to be served on the parties appearing on the Limited Service List maintained in these cases via first class United States mail, postage prepaid and, where possible, via electronic mail.

By: */s/ Jason S. Brookner*
Jason S. Brookner

Exhibit A

Discovery Agreement

GRAY REED

ATTORNEYS & COUNSELORS

JAMES J. ORMISTON
PARTNER
DIRECT DIAL: 713.986.7107
JORMISTON@GRAYREED.COM

May 24, 2019

Via Email: mark@weisbartlaw.net and jbrouner@weisbartlaw.net
Mark A. Weisbart
James S. Brouner
The Law Office of Mark A. Weisbart
12770 Coit Road, Suite 541
Dallas, Texas 75251

Via Email: tfoley@foleybezek.com and aarndt@foleybezek.com
Thomas G. Foley
Aaron Arndt
Foley Bezek Behle & Curtis, LLP
15 West Carrillo St
Santa Barbara, CA 93101

Re: ***In re Rockies Region 2006 Limited Partnership, et al.*** **(the "Debtors"), Case No. 18-33513 (Bankr. N.D. Tex.)**

Dear Counsel:

This letter is intended to memorialize the agreement reached in the "meet and confer" conference held by phone on May 24, 2019 addressing certain objections asserted by the LP Plaintiffs and the Debtors in response to requests for production of documents served by the other party.

The LP Plaintiffs and the Debtors hereby confirm they have not withheld from production, and will not withhold from future productions, any non-privileged documents that are otherwise responsive to requests as to which objections were asserted and followed by a statement that subject to such objections, any non-privileged, responsive documents would be produced. This confirmation and agreement is subject to the prior agreement among the parties to limit the scope of discovery at this stage to those matters relevant to the retention of Karen Nicolaou/Harney Management and the LP Plaintiffs' motion to dismiss the bankruptcy cases.

If this letter accurately sets forth our agreement, please sign below and return an executed copy of this letter to me by email at your earliest convenience. I appreciate your courtesy and cooperation in reaching this agreement.

Sincerely,

/s/ James J. Ormiston

James J. Ormiston

JJO/ep

Agreed:

Counsel for the LP Plaintiffs

cc:

Mike Morfey	*(Via Email: michaelmorfey@huntonak.com)*
Robin Russell	*(Via Email: robinrussell@huntonak.com)*
Michele Blythe	*(Via Email: micheleblythe@huntonak.com)*
Joseph Rovira	*(Via Email: josephrovira@huntonak.com)*
Chad Elder	*(Via Email: celder@irell.com)*
Jason Brookner	*(Firm)*
Lydia Webb	*(Firm)*
Karen Nicolaou	*(Via Email)*

Exhibit B

Email from LP Plaintiffs

From: Jim Brouner <JBrouner@weisbartlaw.net>
Sent: Friday, May 24, 2019 4:53 PM
To: James J. Ormiston <jormiston@grayreed.com>; Tom Foley <tfoley@foleybezek.com>; Mark Weisbart <Mark@weisbartlaw.net>; Chantel Walker <cwalker@foleybezek.com>; Aaron Arndt <aarndt@foleybezek.com>
Cc: Morfey, Michael <MichaelMorfey@andrewskurth.com>; Russell, Robin <RRussell@andrewskurth.com>; Rovira, Joseph <JosephRovira@andrewskurth.com>; Jason S. Brookner <jbrookner@grayreed.com>; Lydia Webb <lwebb@grayreed.com>; Blythe, Michele <MicheleBlythe@andrewskurth.com>
Subject: RE: In re Rockies Region 2006 LP and Rockies Region 2007 LP: Production of Documents by Plaintiffs

Jim,

Attached please find an executed copy of the letter you previously forwarded memorializing our discussions this morning.

Regards,

Jim

James S. Brouner
Attorney – Bankruptcy and Restructuring
12770 Coit Road, Suite 541
Dallas, Texas 75251
Direct: (972) 628-4902
Cell: (214) 732-8939
JBrouner@weisbartlaw.net

From: James J. Ormiston <jormiston@grayreed.com>
Sent: Friday, May 24, 2019 2:52 PM
To: Tom Foley <tfoley@foleybezek.com>; Mark Weisbart <Mark@weisbartlaw.net>; Chantel Walker <cwalker@foleybezek.com>; Aaron Arndt <aarndt@foleybezek.com>; Jim Brouner <JBrouner@weisbartlaw.net>
Cc: Morfey, Michael <MichaelMorfey@andrewskurth.com>; Russell, Robin <RRussell@andrewskurth.com>; Rovira, Joseph <JosephRovira@andrewskurth.com>; Jason S. Brookner <jbrookner@grayreed.com>; Lydia Webb

<lwebb@grayreed.com>; Blythe, Michele <MicheleBlythe@andrewskurth.com>
Subject: RE: In re Rockies Region 2006 LP and Rockies Region 2007 LP: Production of Documents by Plaintiffs

Jim and Aaron (and Tom and Mark):

Attached is a draft of a letter memorializing the agreement reached in our meet and confer this morning. Please review and contact me with any proposed changes. If the letter meets with your approval, please sign and return an executed copy by email at your earliest convenience. Thanks.

Jim

From: Tom Foley <tfoley@foleybezek.com>
Sent: Thursday, May 23, 2019 5:09 PM
To: James J. Ormiston <jormiston@grayreed.com>; Blythe, Michele <MicheleBlythe@andrewskurth.com>; mark@weisbartlaw.net; Chantel Walker <cwalker@foleybezek.com>; Aaron Arndt <aarndt@foleybezek.com>; jbrouner@weisbartlaw.net
Cc: Morfey, Michael <MichaelMorfey@andrewskurth.com>; Russell, Robin <RRussell@andrewskurth.com>; Rovira, Joseph <JosephRovira@andrewskurth.com>; Jason S. Brookner <jbrookner@grayreed.com>; Lydia Webb <lwebb@grayreed.com>
Subject: RE: In re Rockies Region 2006 LP and Rockies Region 2007 LP: Production of Documents by Plaintiffs

Group:

Movants are planning on filing a Motion to Compel both Karen Nicolaou and Darwin Stump to answer certain of the questions that they declined to answer at their respective depositions based on instructions from their counsel. Pursuant to FRCP 37(a)(1), I would like to schedule a conference call with one of the attorneys for Ms. Nicolaou and one of the attorneys for Mr. Stump to meet and confer on these issues. Please let me know what times work for you tomorrow, Friday, May 23, 2019 to participate in a conference call.

Thank you for your attention to this request.

Tom Foley

From: James J. Ormiston <jormiston@grayreed.com>
Sent: Thursday, May 23, 2019 2:41 PM
To: Tom Foley <tfoley@foleybezek.com>; Blythe, Michele <MicheleBlythe@andrewskurth.com>; mark@weisbartlaw.net; Chantel Walker <cwalker@foleybezek.com>; Aaron Arndt <aarndt@foleybezek.com>; jbrouner@weisbartlaw.net
Cc: Morfey, Michael <MichaelMorfey@andrewskurth.com>; Russell, Robin <RRussell@andrewskurth.com>; Rovira, Joseph <JosephRovira@andrewskurth.com>; Jason S. Brookner <jbrookner@grayreed.com>; Lydia Webb <lwebb@grayreed.com>
Subject: RE: In re Rockies Region 2006 LP and Rockies Region 2007 LP: Production of Documents by Plaintiffs

And the Privilege Log?

From: Tom Foley <tfoley@foleybezek.com>
Sent: Thursday, May 23, 2019 4:39 PM

To: James J. Ormiston <jormiston@grayreed.com>; Blythe, Michele <MicheleBlythe@andrewskurth.com>; mark@weisbartlaw.net; Chantel Walker <cwalker@foleybezek.com>; Aaron Arndt <aarndt@foleybezek.com>; jbrouner@weisbartlaw.net
Cc: Morfey, Michael <MichaelMorfey@andrewskurth.com>; Russell, Robin <RRussell@andrewskurth.com>; Rovira, Joseph <JosephRovira@andrewskurth.com>; Jason S. Brookner <jbrookner@grayreed.com>; Lydia Webb <lwebb@grayreed.com>
Subject: RE: In re Rockies Region 2006 LP and Rockies Region 2007 LP: Production of Documents by Plaintiffs

Jim:

The documents are currently being reviewed for any privileged material. We will produce them on Tuesday, May 28, 2019.

Tom Foley

From: James J. Ormiston <jormiston@grayreed.com>
Sent: Thursday, May 23, 2019 1:27 PM
To: Blythe, Michele <MicheleBlythe@andrewskurth.com>; Tom Foley <tfoley@foleybezek.com>; mark@weisbartlaw.net; Chantel Walker <cwalker@foleybezek.com>; Aaron Arndt <aarndt@foleybezek.com>; jbrouner@weisbartlaw.net
Cc: Morfey, Michael <MichaelMorfey@andrewskurth.com>; Russell, Robin <RRussell@andrewskurth.com>; Rovira, Joseph <JosephRovira@andrewskurth.com>; Jason S. Brookner <jbrookner@grayreed.com>; Lydia Webb <lwebb@grayreed.com>
Subject: RE: In re Rockies Region 2006 LP and Rockies Region 2007 LP: Production of Documents by Plaintiffs

Tom and Mark,

Similar to Michele's request below, please advise when the LP Plaintiffs will produce the documents responsive to Debtors' first request for production. Please also let me know when we can expect to receive the LP Plaintiffs' privilege log. Thanks.

Jim

James J. Ormiston
Partner

Gray Reed & McGraw
1300 Post Oak Blvd. Suite 2000
Houston, TX 77056
Tel 713.986.7107 | Fax 713.730.5840
jormiston@grayreed.com | www.grayreed.com

From: Blythe, Michele <MicheleBlythe@andrewskurth.com>
Sent: Wednesday, May 22, 2019 12:09 PM
To: Thomas G. Foley Jr. (tfoley@foleybezek.com) <tfoley@foleybezek.com>; mark@weisbartlaw.net; Chantel Walker (cwalker@foleybezek.com) <cwalker@foleybezek.com>; Aaron Lee Arndt (aarndt@foleybezek.com) <aarndt@foleybezek.com>; jbrouner@weisbartlaw.net
Cc: Morfey, Michael <MichaelMorfey@andrewskurth.com>; Russell, Robin <RRussell@andrewskurth.com>; Rovira,

Joseph <JosephRovira@andrewskurth.com>; Jason S. Brookner <jbrookner@grayreed.com>; Lydia Webb <lwebb@grayreed.com>; James J. Ormiston <jormiston@grayreed.com>
Subject: In re Rockies Region 2006 LP and Rockies Region 2007 LP: Production of Documents by Plaintiffs

Tom,

Plaintiffs indicated in their responses to PDC's First Set of Requests for Production of Documents that responsive documents would be produced. Those responses were served on May 13, 2019; however, no documents have been produced to date. Please advise when PDC can expect to receive the responsive documents.

Thanks,
Michele

Michele R. Blythe
Counsel

HUNTON ANDREWS KURTH LLP
600 Travis Street, Suite 4200 | Houston, TX 77002
+1.713.220.3652 Phone | +1 713.220.4285 Fax
+1.713.220.3716 Alt. Phone
+1.713.220.4188 Assistant - Gail Scruggs
MicheleBlythe@HuntonAK.com | vCard | Bio | HuntonAK.com

Exhibit C

Excerpts from K. Nicolaou Deposition

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	
	)	CASE NO. 18-33513
ROCKIES REGION 2006	)	CHAPTER 11
LIMITED PARTNERSHIP and	)	
ROCKIES REGION 2007	)	
LIMITED PARTNERSHIP	)	(Jointly Administered)
	)	
DEBTORS	)	

ORAL DEPOSITION OF

KAREN NICOLAOU

MAY 7, 2019

ORAL DEPOSITION OF KAREN NICOLAOU, produced as a witness at the instance of The Dufresne Family Trust, The Schulein Family Trust, The Michael A. Gaffey and Joanne M. Gaffey Living Trust, March 2000, and The Glickman Family Trust dated August 29, 1994, The William J. and Judith A. McDonald Living Trust dated April 16, 1991, and duly sworn, was taken in the above-styled and -numbered cause on May 7, 2019, from 9:07 a.m. to 6:04 p.m., before Mercedes Arellano, CSR in and for the State of Texas, reported by machine shorthand, at the law offices of Gray, Reed & McGraw, LLP, 1601 Elm Street Suite 4600, Dallas, Texas, pursuant to the Federal Rules of Civil Procedure.

Q. (BY MR. WEISBART) I'm sorry. Running the day-to-day operations of the partnerships was part of your responsibility under your engagement; is that correct?

A. Yes.

Q. And that was your understanding?

A. Under the responsible party position, yes.

Q. All right. I note under "Scope of Services," one of the items mentioned is to determine the best course of action to wind down the partnership.

Was that part of your duties?

A. My duties were to ascertain how to maximize the assets for the partnership.

Q. I'm just looking at the agreement, what it says. Is my statement a fair statement?

MR. ORMISTON: Objection, form.

If you can understand the question, you can answer it. I don't think his initial question was limited to the exhibit.

A. I'm sorry. I'm confused.

Q. (BY MR. WEISBART) All right. Under this engagement agreement, part of your duties was to determine the best course of action to wind down the partnerships; is that correct?

A. Which I took to mean maximize the value of the

assets.

Q. And as it says, "including overseeing all actions in connection with the potential bankruptcy filing or auction sale," correct?

A. Yes.

Q. Okay. Did you review any documents in connection with whether you had authority to serve as a responsible party for the partnerships?

A. I'm sorry?

Q. Did you review any documents to determine whether you had authority to serve as responsible party for the partnerships?

A. Yes.

Q. What documents did you review?

A. Partnership agreements.

(Exhibits 3 and 4 marked.)

Q. (BY MR. WEISBART) Let me hand you Exhibits 3 and 4, and ask you to identify those documents if you can, please.

A. I'm sorry.

Q. Which is -- what is Exhibit 3?

A. The Form of Limited Partnership Agreement of Rockies Region 2006 Limited Partnership.

Q. And Exhibit 4?

A. Is Form of Limited Partnership Agreement of

conclusion?

A. Could you repeat.

Q. That you had authority to service responsible party?

A. They're --

MR. ORMISTON: He's just asking you yes or no, did the lawyers at Gray Reed inform you of the basis of their conclusion?

A. Yes.

Q. (BY MR. WEISBART) And was their conclusion the same as yours?

MR. ORMISTON: Objection, calls for the disclosure of attorney-client privilege information. Instruct the witness not to answer the question.

Q. (BY MR. WEISBART) Did you rely on the advice of Gray Reed in connection with your engagement?

A. I listened to what they had to say and made my own decision.

Q. Did you obtain a legal opinion concerning your ability to be employed as responsible party?

A. No.

Q. Did you have any conversations with anyone at PDC concerning your role as responsible party?

A. No.

Q. Did you express any concerns to PDC or anyone

performing as responsible party?

A. Yes.

Q. All right. And it also says, "Analyzing the books and records of the partnerships and resolving issues related to claims against an interest in the partnerships."

Do you see that?

A. Yes.

Q. What -- are those services you've been performing?

A. The first part of it, yes.

Q. What first part?

A. Analyzing the books and records of the partnerships, yes.

Q. Okay. And the second part, you haven't; is that correct?

A. We have not resolved any, no.

Q. All right. What resolution is required -- associated with interest in the partnerships?

A. I haven't analyzed it.

Q. All right. In connection with the advice you received from Gray Reed in connection with this engagement letter, did Gray Reed bill you for their services relating --

Q. You might not get lunch.
Did you direct those professionals?
A. Yes.
Q. There was a trip after the May 21st meeting to the wells. What was the point of the trip?
A. I'm sorry?
Q. You had -- you took a trip the next day after your May 21st meeting to visit some of the wells; is that correct?
A. Yes.
Q. What was the purpose of the trip?
A. To see the wells.
Q. To see them?
A. Yes, to...
Q. Anything else?
A. (Moving head from side to side.)
Q. All right. As part of your evaluation of the partnerships, did you have any discussions with officers, employees, or representatives of PDC?
A. Could you repeat the first half of that question, please.
Q. As part of your evaluation of the partnerships, did you have any discussions with officers, employees, or representatives of PDC?
A. I had discussions with...

your duties as responsible party, the partnership agreement.

Are there -- having seen the list of documents that have been provided to you, are there other documents besides the partnership agreements that you reviewed?

A. I'm sorry?

Q. What documents did you review in -- as responsible party, in connection with the evaluation of the partnerships?

A. The SCC filings, the financial statements, the partnership agreement, the Ryder Scott reports, an analysis performed by Graves & Company.

Q. Anything else you can think of?

A. As I sit here today, no.

Q. Was Robert Tiddens, T-I-D-D-E-N-S --

A. Tiddens? I'm sorry?

Q. Robert Tiddens.

If you look at -- on your notes, docket number -- excuse me -- 5931, a call with Robert Tiddens, Jason Brookner?

A. Yes.

Q. Do you recall the conversation with Mr. Tiddens?

A. Yes.

Q. Can you explain what was discussed and --
A. Potential engagement.
Q. Who is he?
A. He is a gentleman who does a significant amount of work in the Colorado area, is my understanding.
Q. For what purpose would he be engaged?
A. To assist in the analysis of the alternatives for the partnerships.
Q. What is his profession?
A. I do not recall.
Q. Well, why -- would he -- why were you talking to him for this purpose?
A. To assist.
Q. Did he have any special expertise? Let me ask the question that way.
A. As I understood it, he had expertise in advanced aged wells, et cetera, in the Wattenberg, and transactions in the area.
Q. So is he an oil and gas person, so to speak?
A. I don't remember his background.
Q. Did you employ him?
A. I did not.
Q. Did he provide any advice associated with your role as responsible party?
A. No.

A. Yes.
Q. Mr. Stump would provide you drafts of the reports or get your input on them; is that correct?
A. Yes.
Q. You mentioned the Graves firm and Mr. Graves as being employed by you as Petroleum Engineers; is that correct?
A. Yes.
Q. What was the point of their engagement?
A. To review and evaluate the value of the assets owned by the partnerships.
Q. The oil and gas assets?
A. Yes.
Q. Had you used Mr. Graves before?
A. Yes.
Q. Why did you select him?
A. For his expertise in the field.
Q. When did you first contact him?
A. I don't know.
Q. Was it mid-June?
A. That sounds about right.
Q. It appears you had a call with him in the middle of June, just around June 13th or 14th. Do you recall having the conversations with him in that time frame?

A. Could you repeat that, please.

Q. Yeah.

Did you have any conversations at Gray Reed related to the cost or obligation of the partnerships to pay plugging costs?

A. Yes.

Q. The plugging liabilities -- the future liabilities was one of the principal reasons for filing the bankruptcy case, was it not?

A. Yes.

Q. And did you determine that these costs are obligations of the partnerships?

A. Yes.

Q. And how did you go about making that determination?

A. I'm sorry?

Q. How did you go about making that determination?

A. In consultation with Darwin Stump at PDC and my attorneys, and just review of -- I don't want to put -- what's available on the web in terms of regulations, et cetera.

Q. Uh-huh. Would you refer back to the partnership agreement, maybe the 2007 one?

A. 2007, Exhibit 4?

Q. I think that's right.

the value of a release of claims?

MR. ORMISTON: Objection, form.

A. It's just a way to -- it's a way to negotiate. It's a way to value it. It's the way PDC looks at it.

Q. (BY MR. WEISBART) All right. I'll take one more stab at it. The amount of 2,950,000 per limited partners in RR06, that's the amount they're going to get in exchange for a release of all claims against the buyer; is that correct?

A. Correct.

Q. And so the release is a -- I refer to it as a litigation release. But it's a release of claims or causes of action that could have been asserted against that.

And my question is: Did you do a valuation of the claims and causes of action that are being released by virtue of this payment?

A. Yes.

Q. What did you conclude the value of those claims were?

A. That -- what I concluded as part of this analysis was that this was fair in the circumstances.

Q. So you concluded that 2,950 -- excuse me, $2,950,000 is the value of the litigation of all claims that could have been asserted or are being asserted

against buyer; is that correct?

A. Yes.

Q. So you did do a damage analysis, then?

MR. ORMISTON: Objection, form.

A. To the ex- -- we analyzed the claims. Damage analysis is -- yes, to the extent that we were able to determine that this is a reasonable settlement, yes, we did an analysis.

Q. (BY MR. WEISBART) Who's "we"?

A. We, in conjunction with Mr. Graves -- Graves Consulting, myself, my attorneys -- myself and my professionals.

Q. Was the analysis in writing?

A. No.

Q. What was the analysis?

A. Beg your pardon?

Q. What is the analysis?

MR. ORMISTON: Objection, form. Analysis of what, litigation damages or a fair settlement?

Q. (BY MR. WEISBART) Well, let's do both. Analysis of litigation damages, what was your analysis?

MR. ORMISTON: Didn't do that. She hadn't testified she did that.

Q. (BY MR. WEISBART) Did you do an analysis of litigation damages?

Q. (BY MR. WEISBART) Is that what it says?

MR. ORMISTON: Assets, not address.

Q. (BY MR. WEISBART) Okay. I'll read -- you want to read Paragraph 3, because I tend to -- I guess I misread it.

A. "Location of principal assets, (the address -- the address of the bank where the accounts are held.)"

Q. Okay. So were you asking him for the address of the bank, that being the principal asset of the partnerships?

A. That's in addition to the address, the location of the principal assets.

Q. Oh, okay. So you didn't think the bank accounts were the principal assets?

A. They're the -- they were the most valuable assets at that point in time.

Q. Really? Is that your opinion?

A. The claims are -- at that point -- at this point in time, claims were subject to litigation risk, timing risk, other, you know, aspects. There were aspects of the partnership agreements, as we've covered here, that weren't -- that aren't clear -- weren't clear to me at the time. So with respect to assets that were not contingent, not disputed and not unliquidated, the

bank accounts were the biggest positives.

Q. Okay. You've said on several occasions already today that you did not conduct a detailed litigation analysis; is that correct?

MR. ORMISTON: Objection, form.

A. I looked at -- I've looked at the claims from a litigation perspective. I have consulted with my attorneys.

Q. (BY MR. WEISBART) Are you changing your testimony?

MR. ORMISTON: Objection, form.

A. No.

Q. (BY MR. WEISBART) Okay. I'll just ask it one more time, and we'll put it to bed.

Did you or did you not prepare a detailed litigation analysis in connection with the Denver litigation?

A. I did not.

Q. All right. Did your lawyers prepare a detailed litigation analysis in connection with the Denver litigation?

A. No.

Q. Thank you.

Let me hand you what has been marked as Exhibit 26.

partnerships to determine if claims exist as to the financial reporting or financial transactions conducted by the partnerships over the past eight years?

A. No.

Q. Again, outside of the allegations in the Denver litigation, did you consult any oil and gas experts to determine if there were any claims held by the partnership related to PDC's role as operator of the partnership's of oil and gas wells?

A. Please repeat the question.

Q. Outside of the allegations in the Denver lawsuit, did you consult any oil and gas experts to determine if there were any claims held by the partnerships related to PDC's role as operator of the partnership's oil and gas wells?

A. No.

Q. Give me one second.

Did you consider any other options besides the settlement with PDC in filing the bankruptcy cases?

A. I beg your pardon?

Q. Did you consider any other options besides the settlement -- the proposed settlement with PDC, which resulted in the filing of the bankruptcy cases?

MR. ORMISTON: Objection, form.

A. Yes.

Q. (BY MR. WEISBART) What other options did you consider?

A. We considered -- we auctioned. We considered auctioning properties through the clearinghouse, and there were other individuals who contacted us making inquiries about the properties themselves.

Q. Auctioning the properties outside of bankruptcy?

A. Inside of bankruptcy. We did it through the bankruptcy process.

Q. Okay.

A. I'm sorry. Did I miss --

Q. The -- aside from the proposed agreement with PDC that we saw on the term sheet, which -- and filing the bankruptcy case to seek approval of that settlement, did you consider any other options to maximize the value of the partnership's assets?

MR. ORMISTON: Objection, form.

A. We put all of the interest up for sale in public auction.

Q. (BY MR. WEISBART) Well, did you have any conversations with anyone about alternatives to filing bankruptcy?

A. We -- no.

Q. One option would be not to file bankruptcy and not to do the settlement, and to simply allow the partnerships to continue to operate and plug and abandon the wells and ultimately wind them down. Is that an option you considered?

A. It's an option, but it's not a practical option.

Q. My question is: Did you consider it?

A. Yes.

Q. You did? Okay.

Any other options that you can think of, aside the one I just laid out there?

A. We -- we looked at the condition of the properties. We looked at what we could do potentially as you said, let them play out. We looked at bankruptcy.

Q. Okay. Well, let's discuss the let-them-play-out option. And I believe you said that wasn't practical?

A. Correct.

Q. Can you explain what you mean by that in a little more detail?

A. The partnerships, at the point in time we were making the determination, were not flowing sufficient cash to support their activities. And PDC was -- and

when I say "activities," I am including SCC reporting requirements, auditing, analyses by Ryder Scott, you know, the activities surrounding -- you know, and reimbursement for employees, well services, all of those kinds of things.

The partnerships were not producing enough cash to cover their expenses as they came due, which requires the general partner to continue to fund until the end of time, if you will, until the last well is plugged and abandoned. PDC has fiduciary obligations beyond its fiduciary obligations to the partnerships to its board.

Its board has obligations to its investors to continue -- to ask PDC to continue -- or any general partner to continue to fund losses with no reasonable expectation, you know, of a payback is not a practical solution.

MR. WEISBART: Can you read back that answer please.

(Requested portion was read.)

Q. (BY MR. WEISBART) And you mentioned, I think, reimburse employees. Is that a term?

A. Accounting expenses.

Q. Accounting expenses?

A. (Moving head up and down.)

Q. To outside accountants?

A. Outside accountants, and any direct accounting services provided by the general partner.

Q. Okay. Did you run any projections on what these costs would total outside of bankruptcy time -- outside of bankruptcy up to the point of winding up the partnerships?

A. I have a back of the napkin -- we did a back of the napkin estimate. I don't have anything in writing to corroborate it.

Q. I thought I was going to get a napkin. You don't have a napkin? You have nothing in writing?

A. No. You have $3 million or so in plugging and abandonment liability; you have continuing SCC reporting quarterly and annually; couple hundred thousand dollars a year. So you know, it's $5- or $6 million over time.

Q. Well, how much time would it take to -- what did you project the time it would take to wind up the partnerships?

MR. ORMISTON: Objection, form.

A. We didn't -- the question I answered before was a practical solution and didn't include any legal items for winding down the partnerships themselves.

It's -- until the -- I believe I said the last well was plugged and abandoned. I don't know what

that time frame is, if it's five years or seven years, depending on which partnership and which well. There would be additional costs associated -- associated with the wind down and shutting down of the legal entity, the partnership, which I don't have an estimate for.

Q. (BY MR. WEISBART) Did anyone evaluate those costs for you?

A. No.

Q. Then how do you know there are costs associated with that?

A. I've done it before. History -- my professional history tells me that there are some costs associated with that.

Q. You've wound down a public partnership based on West Virginia law before?

A. I have wound down publicly traded entities, yes -- I'm sorry. No, I have not wound down a West Virginia partnership.

Q. Okay. Did you consult with any West Virginia attorneys about the wind-down process or any attorneys at all, then?

A. No.

Q. All right. As far as the -- well, let's just talk about the '06 partnership. There were roughly at the time of filing the case, three wells that were

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	)	
	)	CASE NO. 18-33513
ROCKIES REGION 2006	)	CHAPTER 11
LIMITED PARTNERSHIP and	)	
ROCKIES REGION 2007	)	
LIMITED PARTNERSHIP	)	(Jointly Administered)
	)	
DEBTORS	)	

REPORTER'S CERTIFICATION
DEPOSITION OF KAREN NICOLAOU
MAY 7, 2019

I, Mercedes Arellano, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, KAREN NICOLAOU, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That examination and signature of the witness to the deposition transcript was waived by the witness and agreement of the parties at the time of the deposition;

That the original deposition was delivered to Mr. Mark A. Weisbart;

That the amount of time used by each party at the deposition is as follows:

Mr. Mark Weisbart 06 HOURS:08 MINUTES

That $_____ is the deposition officer's charges to the Party for preparing the original deposition transcript and any copies of exhibits;

That pursuant to information given to the deposition officer at the time said testimony was taken, the following includes all parties of record:

Mr. Mark A. Weisbart, Mr. James S. Brouner, and Mr. Thomas G. Foley, Attorneys for The Dufresne Family Trust, The Schulein Family Trust, The Michael A. Gaffey and Joanne M. Gaffey Living Trust, March 2000, and The Glickman Family Trust dated August 29, 1994, The William J. and Judith A. McDonald Living Trust dated April 16, 1991

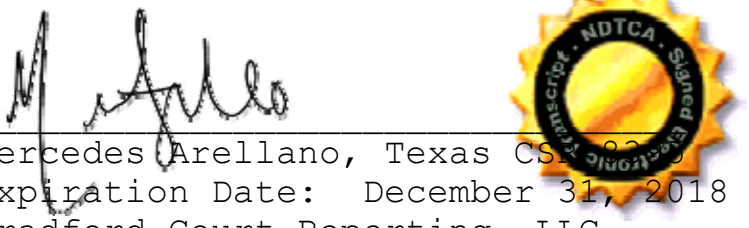
Mr. James Ormiston and Mr. Jason Brookner, Attorneys for Debtors

Mr. Michael D. Morfey, Ms. Robin Russell, and Mr. Charles E. Elder, Attorneys for PDC Energy

That a copy of this certificate was served on all parties shown herein on _____ and filed with the Clerk pursuant to Rule 203.3.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this ___ day of May, 2019.



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