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

IN RE: Rockies Region 2006 Limited Partnership and Rockies Region 2007 Limited Partnership, *Debtors*.	Case No. 18-33513 Chapter 11 Jointly Administered

LIMITED PARTNERS' TRIAL BRIEF IN SUPPORT OF AMENDED MOTION TO DISMISS

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Robert R. Dufresne, as Trustee of the Dufresne Family Trust; Michael A. Gaffey, as Trustee of the Michael A. Gaffey and JoAnne M. Gaffey Living Trust dated March 2000; Ronald Glickman, as Trustee of the Glickman Family Trust established August 29, 1994; Jeffrey M. Schulein, as Trustee of the Schulein Family Trust established March 29, 1989; and William J. McDonald as Trustee of the William J. McDonald and Judith A. McDonald Living Trust dated April 16, 1991 (collectively, the "Limited Partners") are all limited partners in one or both of the Rockies Region 2006 and the Rockies Region 2007 Limited Partnerships (together, the "Debtors" or "Partnerships"). The Limited Partners hereby file this Trial Brief in support of their Amended Motion for Dismissal of Chapter 11 Case [Doc. 140] and respectfully state as follows:

PRELIMINARY STATEMENT

1. To avoid needless repetition, the Limited Partners incorporate their Amended Motion for Dismissal of Chapter 11 Case [Doc. 140] (the "Motion to Dismiss") and the Joint Pre-Trial Order (the "JPTO") into this Trial Brief as if fully set forth herein. In particular, the Limited Partners draw the Court's attention to paragraphs 1 through 20 of their Motion to Dismiss, which provide much of the factual and procedural background of this case; background that has been presented to the Court on multiple occasions, not only in the Limited Partners' Motion to Dismiss, but in the myriad other pre-trial motions that have been filed by the parties to this action.

2. Instead of belaboring those details, the Limited Partners focus here on (1) those facts that have been uncovered through pre-trial discovery and that support granting the relief sought by the Limited Partners through their Motion to Dismiss and (2) addressing the specific arguments made in the Debtors' Objection to Motion for Dismissal of Chapter 11 Case [Doc. 141] (the "Debtors' Objection," cited as "DR Obj."), and PDC's Objection to Motion for

Dismissal of Chapter 11 Case [Doc. 143] (the "PDC Obj.").

DISCUSSION

A. The Debtors' cases were filed in bad faith.

i. Under the "totality of the circumstances" test, the petitions were not filed for a "valid bankruptcy purpose" under chapter 11.

3. To start, the Debtors and PDC acknowledge that courts in the Fifth Circuit consider the "totality of the circumstances" when considering whether a bankruptcy petition was filed in good faith, assessing (among other things) the "debtor's financial condition, motives, and the local financial realities." (DR Obj., ¶ 32 (quoting *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072–73 (5th Cir. 1986.)); PDC Obj. ¶ 42 (quoting *Investors Group, LLC v. Pottorff*, 518 B.R. 380, 382 (Bankr. N.D. Tex. 2014)).) In *Little Creek*, the Fifth Circuit held that "[d]etermining whether the debtor's filing for relief is in good faith depends largely upon the bankruptcy court's on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities. Findings of lack of good faith … have been predicated on certain recurring but non-exclusive patterns, and they are based on a conglomerate of factors rather than on any single datum." 779 F.2d at 1072. In fact, the *Little Creek* court specifically found that the existence of litigation is one such circumstance that is relevant to the court's determination of good faith. *See id.* at 1073.

4. But, as quickly as Debtors acknowledge the governing "totality of the circumstances" test, they argue that it is only applicable in "single asset real estate cases." (DR Obj., ¶ 33.) Debtors contend that the *Little Creek* standard should not be used in this case but, instead, the Court should ask merely whether the petitions here were filed for a "valid bankruptcy purpose." (*Id.* at ¶ 34.) However, the authority offered by the Debtors not only fails to invalidate the *Little Creek* standard but also demonstrates that dismissal is also warranted

under the "valid bankruptcy purpose" standard as well.

5. For example, Debtors rely on *In re Mirant Corp.*, No. 03-46590 Jointly Administered, 2005 Bankr. LEXIS 1686, at *25 (Bankr. N.D. Tex. Jan. 26, 2005) for the conclusion that, when the facts of a case are "antithetical to those of *Little Creek*," the "valid bankruptcy test" should be used. While the court in *Mirant Corp.* merely states that it finds cases that focus on the "valid bankruptcy test" "more useful" for its analysis (*see id.*), it articulates that, in the chapter 11 context, courts should consider whether the bankruptcy was filed to "effectuate a valid reorganization," to "preserv[e] going concerns," to "seek a chance to stay in business," or to effectuate "the debtor's *bona fide* need for a breathing spell to reorganize." *Id.* (quoting, respectively, *Cedar Shore Resort, Inc. v. Mueller (In re Cedar Shore Resort, Inc.)*, 235 F.3d 375, 380 (8th Cir. 2000); *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108, 119 (3d Cir. 2004); *Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 165–66 (3d Cir. 1999); and *In re Original IFPC S'holders, Inc.*, 317 B.R. 738, 750 (Bankr. N.D. Ill. 2004)).

6. As pronounced in *Little Creek*, the purpose of chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state. "If there is not a potentially viable business in place worthy of protection and rehabilitation, the Chapter 11 effort has lost its *raison d'etre*." 779 F.2d at 1073 (citations omitted); cf., *Kelley v. Cyrpess Fin. Trading Co., L.P. (In re Cypress Fin. Trading Co., L.P.*), 620 Fed. Appx. 287 (5th Cir. 2015) (affirming dismissal of corporate chapter 7 case for cause where bankruptcy served no purpose as debtor would not receive a discharge and there were no assets to marshal and liquidate).

7. In this instance, the Debtors, by their own admission, have no viable business to

rehabilitate that's worthy of chapter 11 protection. The Debtors' liabilities well exceed the value of their assets, they are solely reliant on their general partner, PDC, to cover the operational expenses of their working assets and they have no intention of exiting bankruptcy, rather, they intend to cancel all limited partner units and dissolve. Every aspect of the Debtors' proposed plan could be attained through a chapter 7 filing—sale of assets and settling of litigation claims. The only advantage of the cases' current posture is the control over these matters by PDC's selected nominee, Nicolaou, rather than an independent chapter 7 trustee.

8. The engagement letter between Bridgeport Consulting LLC ("Bridgepoint") and PDC for the services of Nicolaou sets forth the responsibility PDC as managing general partner of the Partnerships delegated to Nicolaou:

> As Responsible Party and independent fiduciary for the Partnerships, Nicolaou will serve as the authorized representative for each of the Partnerships with authority to oversee the Partnerships in determining the best course of action to wind-down the Partnerships, including overseeing all actions in connection with a potential bankruptcy filing or an auction sale of the Partnerships' assets. In the role of Responsible Party, Nicolaou will have the authority to perform all services necessary and consistent with her position, including but not limited to: Exploring options for divesting of assets of the Partnerships and entering into and executing definitive documents to effect such sale; . . .

(LP Ex. 7.)

9. Not only was PDC's decision to retain Nicolaou in "overseeing the Partnerships in actions in connection with a potential bankruptcy filing …" made to enable PDC to maintain control of the Partnerships' assets during the pendency of the Debtors' bankruptcy cases, her retention and the filing of these cases were motivated for the primary purpose of insulating PDC and its officers and directors who were individually named from potential liability in the *Dufresne* litigation. On this point, there is copious case law supporting the conclusion that *motive* is relevant to a bad faith determination and that the filing of a bankruptcy petition with the

motive to impede non-bankruptcy litigation or to gain an advantage in litigation constitutes grounds for a bad faith dismissal. *See, e.g., Little Creek*, 779 F.2d at 1071–73; *In re Antelope Technologies, Inc.*, 431 Fed. Appx. 272, 275 (5th Cir. 2011) (fact that "the petition was filed to gain an advantage in the shareholder litigation rather than for reorganization" was sufficient to show bad faith); *In re Humble Place Joint Venture*, 936 F.2d 814, 818 (5th Cir. 1991) (affirming dismissal of chapter 11 bankruptcy case that was filed to avoid the litigation of disputes that were "… fully capable of resolution in state court without the delay and expense caused by bankruptcy."); *Investors Group, LLC v. Pottorff*, 518 B.R. 380, 384 (N.D. Tex. 2014) ("[I]t constitutes bad faith to file bankruptcy to impede, delay, forum shop, or obtain a tactical advantage regarding litigation ongoing in bankruptcy forum …") (internal citations omitted); *In re Mirant Corp.*, 2005 Bankr. LEXIS 1686, at *31 ("In analyzing the purpose of a debtor's chapter 11 petition in the context of a motion to dismiss for bad faith filing, the courts regularly consider whether the bankruptcy was intended to obtain tactical advantage in litigation or negotiations.").

10. Additionally, the fact that a proposed chapter 11 plan releases an insider of the Debtors—i.e., PDC, which is a defendant in ongoing non-bankruptcy litigation—supports a finding that the purpose of filing bankruptcy was to improperly gain a litigation advantage. *See In re Antelope Technologies, Inc.*, 431 Fed. Appx. at 273–75 (affirming finding of bad faith by bankruptcy court when that court found release of defendant-insiders in chapter 11 plan supported bad faith). Here, Debtors' proposed chapter 11 plan seeks to release PDC of all derivative and direct claims asserted in the *Dufresne* litigation. (LP Ex. 135, Doc. 57 at 20–21.)

11. While Debtors have argued that bankruptcy may be appropriately filed to avoid "oppressive litigation," such an observation is not applicable to the present case. In such cases,

the debtors themselves face oppressive litigation that necessitates reorganization through chapter 11 in order to ensure their financial viability or management's focus on core business operations. These concerns are not present in these cases. The Debtor Partnerships were never subject to financial risk and the pending litigation had minimal effect on their operations, i.e. the operation of their oil and gas wells. The Partnerships were named as nominal defendants in the litigation only because federal rules require naming the corporation or partnership for whose benefit the derivative claims. *See, e.g., Buckley v. Control Data Corp.*, 923 F.2d 96, 98 (8th Cir. 1991) ("It is well established that an entity on whose behalf a derivative claim is asserted is a necessary defendant in the derivative action"). The Debtor Partnerships are not facing liability in the *Dufresne* litigation, but instead hold claims against PDC—their managing general partner. It is PDC that determined that it was in its best interest to engage Nicolaou to assert control over these derivative claims (derivative claims that Nicolaou admits she did not assess prior to the filing of these bankruptcy cases and that she failed to list in the original Schedule of Assets and Liabilities for the Debtors.).

12. In fact Darwin Stump, an officer of PDC who was designated to testify on behalf of the company under Fed. R. Civ. P. 30(b)(6), that PDC hired Nicolaou because it wanted to purchase the assets of the Partnerships and felt that hiring Nicolaou, as an independent third party, would make such a purchase appear more like an arm's length transaction. (LP Ex.79, May 15, 2019, Deposition of Darwin Stump ("Stump") at 109:17–110:6, 121:18–122:9.) PDC hired Nicolaou to provide "strategic alternatives" to PDC, so that it could avoid purchasing the assets of the Partnerships under section 5.07 of the Partnership Agreements, which would require PDC to purchase those assets at "a fair and reasonable price." (LP Ex. 79, Stump at 113:2–117:8.)

13. Stump testified that PDC hired Nicolaou to file bankruptcy petitions on behalf of the Eastern Partnerships as part of PDC's 3-year plan to acquire all of the assets of its drilling partnerships (LP Ex. 79, Stump at 94:6–9, 95:2–97:24), which she did on September 16, 2013. No motions to dismiss were filed in the Eastern Partnership bankruptcy proceedings.

ii. Debtors' purported liabilities do not support the filing of the bankruptcy petitions.

14. In the Declaration of Karen Nicolaou in Support of Chapter 11 Petitions (Doc. 10; the "Nicolaou Declaration") and in Debtors' Objection, the Debtors claim that the Partnerships' "wells are coming to the end of their productive lives" and that certain financial difficulties necessitate the filing of bankruptcy. (DR Obj., ¶ 4.) Namely, Debtors assert that the Partnerships' plugging and abandoning ("P&A") liability and ongoing reporting obligations to the Securities and Exchange Commission ("SEC") support the conclusion that the monthly cost of operating the Partnerships and their wells exceeds the revenues they generate. (*Id.* at ¶¶ 4–7.) PDC makes similar arguments in its Objection regarding the Partnerships' P&A liabilities. (PDC Obj., ¶ 23.) While the Limited Partners do not contest the *existence* of the Partnerships P&A and SEC liabilities, Debtors and PDC are wrong to conclude that these liabilities support the filing of bankruptcy on the Partnerships' behalf.

15. *First*, concerning the Partnerships' alleged P&A liabilities, the Partnership Agreements expressly provide, in sections 1.08(n), 2.01(b), and 7.12, that it is PDC's responsibility, as the managing general partner, to pay the P&A costs of the Partnerships' vertical wells. More specifically, section 1.08(n) of the Partnership Agreements define "Drilling and Completion Costs" as:

> … all costs, excluding Operating Costs, of drilling, completing, testing, equipping and bringing a well into production **or plugging and abandoning it**, including all labor and other construction and

> installation costs incident thereto, location and surface damages, cementing, drilling mud and chemicals, drill stem tests and core analysis, engineering and well site geological expenses, electric logs, costs of plugging back, deepening, rework operations, repairing or performing remedial work of any type, **costs of plugging and abandoning any well participated in by the Partnership**, and reimbursements and compensation to well operators, including charges paid to the Managing General Partner as unit operator during the drilling and completion phase of a well, plus the cost of the gathering system and of acquiring leasehold interests.

(LP Ex. 5 at 7[1] (emphasis added).) Relatedly, section 2.01(b) of the Partnership Agreements provides that:

> The Managing General Partner shall pay all Lease and tangible drilling costs as well as all Intangible Drilling Costs in excess of such costs paid by the Investor Partners with respect to the Partnership; to the extent that such costs are greater than the Managing General Partner's Capital Contribution set forth in the previous subsection, the Managing General Partner shall make such additional contributions in cash to the Partnership equal to such additional Costs; in the event of such additional Capital Contribution, the Managing General Partner's share of profits and losses and distributions shall equal the percentage arrived at by dividing the Managing General Partner's Capital Contribution by the total well costs, excluding the Managing General Partner's Drilling Compensation, except that such percentage may be revised by Sections 3.02

(*Id.* at 12.) And finally, section 7.12 of the Partnership Agreements provides that:

> Except as otherwise provided in this Agreement or as otherwise provided by the Act, each General Partner shall be jointly and severally liable for the debts and obligations of the Partnership. In

[1] Attached as Exhibit 5 to Limited Partners' Exhibit List is a true and correct copy of the Partnership Agreement for the Rockies Region 2006 Limited Partnership. It is undisputed that the Partnership Agreements that govern both Partnerships are substantially identical. (LP 79, Stump at 55:9–56:12.)

> addition, each Additional General Partner shall be jointly and severally liable for any wrongful acts or omissions of the Managing General Partner and/or the misapplication of money or property of a third party by the Managing General Partner acting within the scope of its apparent authority to the extent such acts or omissions are chargeable to the Partnership.

(*Id.* at 37-38.)

16. Thus, while technically the Partnerships are responsible for paying P&A expenses, if the Partnerships don't have the funds to do so, it is clear that the Partnership Agreements assign all P&A liabilities to PDC, in its capacity as managing general partner, and are not a liability of the Partnerships themselves. In fact, Stump testified in pre-trial discovery that it was PDC's responsibility, as managing general partner, to pay both the tangible and intangible drilling costs of the Partnerships if the Partnerships themselves did not have the funds to do so. (LP Ex. 79, Stump at 57:24–60:15, 68:24–70:16.) These provisions also provide that PDC's capital account would be adjusted higher if it was necessary for PDC to make the required additional cash contributions to pay tangible or intangible costs of the Partnerships.

17. It should also be noted that PDC was given the authority in the Partnership Agreements to withhold from the distributions to the Partnerships' limited partners the funds that might be necessary to plug and abandon the Partnerships' wells. (LP Ex. 79, Stump 70:17–22.) And, absent such withholdings, PDC bore the responsibility to pay the Partnerships' P&A liabilities. (LP Ex. 79, Stump at 73:3–74:6.) Stump testified on behalf of PDC that he "did not know" why PDC failed to withhold sufficient funds to cover the Partnerships' P&A liabilities. (LP Ex. 79, Stump at 74:25–76:11.)

18. Moreover, PDC and the Debtors objected to the questioning of Stump on topics related to the Partnerships' P&A liabilities, going so far as to instruct Stump not to answer questions that simply asked how PDC calculated the Partnerships' P&A liabilities. (Doc. 175 at

13, 16–17.) PDC and the Debtors contended that such questions were not relevant to the issue of whether the bankruptcy petitions in these cases were filed in bad faith and whether Nicolaou's appointment as Responsible Party should be approved by this Court. *Id.* Having prevailed in asserting this argument, PDC and the Debtors are now judicially estopped from asserting that the Partnerships' P&A liabilities *are* relevant to the Court's decision on the Limited Partners' Motion to Dismiss and from using such liabilities to assert that the P&A costs support a finding that the bankruptcy petitions were filed for a "valid bankruptcy purpose." *See Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) ("Judicial estoppel is a common law doctrine that prevents a party from assuming inconsistent positions in litigation."); *Phillips v. City of Dallas*, 781 F.3d 772, 783 (5th Cir. 2015).

19. *Second*, as to the Partnerships' alleged ongoing SEC reporting obligations, Stump testified on behalf of PDC that if the company dissolved the Partnerships pursuant to section 9 of the Partnership Agreements, entitled "Dissolution; Winding-up," it would terminate the Partnerships' requirements to file with the SEC. (LP Ex. 79, Stump at 137:16–138:8.)

iii. Debtors and PDC have failed to rebut the myriad other factors that support a finding that these cases were filed in bad faith.

20. *First*, on the issue of where the Debtors' principal assets are located, the Debtors rely solely on the Partnerships' bank accounts located in the Northern District of Texas but fail to show that these bank accounts actually constitute the principal assets of the Partnerships under 28 U.S.C. § 1408. (DR Obj., ¶¶ 55–56.) During discovery, Stump admitted on behalf of PDC that the Debtors' bank accounts in Texas that serve as the basis for venue in N.D. Texas were opened for the express purpose of establishing venue in this District in the event PDC decided at a later point in time to pursue a bankruptcy strategy for acquiring the assets of the Partnerships. (LP Ex. 79, Stump at 31:10–32:12.) These bank accounts were not created when the Partnerships

were formed but were opened in 2015 and, when they were initially opened, PDC did not deposit any funds into the accounts. (LP Ex. 79, Stump at 28:21–30:17.) Moreover, the Partnerships' Texas bank accounts were not the accounts used by PDC and the Partnerships to either pay the Partnerships' expenses in the ordinary course of business or to pay distributions to the Partnerships' limited partners. (LP Ex. 79, Stump at 24:21–26:4, 26:15–27:1.)

21. PDC admits that, at the time the Texas bank accounts were created, the Partnerships had no oil and gas interests in Texas, no offices in Texas, no employees in Texas, and that the Texas bank accounts were the sole personal property of the Partnerships in Texas and were opened by PDC "in case sometime down the road they would be put in bankruptcy court." (LP Ex. 79, Stump at 30:18–31:16.) In fact, Nicolaou was added as a signatory to the Texas bank accounts in 2016, well in advance of PDC's purported decision in 2018 to appoint Nicolaou as Responsible Party for the purpose of placing the Partnerships into bankruptcy. (LP Ex. 184.)

22. In addition, Debtors' statement that venue is proper, regardless of where the Partnerships' principal assets are located because "reasonable notice" was given to the Limited Partners that the bankruptcy cases were filed, is nonsense. The venue provisions of the Bankruptcy Code are concerned with the court's jurisdiction over the claims being asserted and not to ensure proper notice to the stakeholders. *See, e.g.*, *ICMR, Inc. v. Tri-City Foods, Inc.*, 100 B.R. 51, 54 (D. Kan. 1989) (bankruptcy case filed in venue that did not constitute where entity had its principal assets could not be maintained in the venue based on a claim of "the convenience of the parties."). Debtors' claim that the Limited Partners received proper notice and even attended the meeting of creditors is irrelevant to the question of whether this action is properly venued in this district.

23. *Second*, Debtors and PDC fail to rebut the claim that PDC's status as an insider and only creditor of Debtors is indicative of bad faith. Debtors' sole response is that the bankruptcy petition at issue in *Investors' Group, LLC v. Pottorff*, 518 B.R. 380, 384 (N.D. Tex. 2014) was filed without any pressure from creditors, either internal or external. (DR Obj., ¶ 49.) This misses the point. Here, PDC, as managing general partner of the Debtor Partnerships, is an undeniable insider of the Partnerships with sole and exclusive control over their operations. Thus, PDC was able to make the decision as to when to incur the P&A liabilities on behalf of the Partnerships and, at the same time, use those P&A liabilities as a pretext to "pressure" the Partnerships to enter bankruptcy. Section 1.07 of the Partnership Agreements confirm that PDC has "an overriding fiduciary obligation to the Investor Partners." West Virginia's statute dealing with the fiduciary duty between partners states that a partner owes the partnership and the other partners a duty of care and loyalty to account to the partnership and hold as a trustee the partnership's property, profit or benefit derived by the partner "in the conduct and winding up of the partnership business" and "[t]o refrain from dealing with the partnership in the conduct of the winding up of the partnership business or on behalf of a party having an interest adverse to the partnership . . ." (West Virginia Code section 47B-4-4.) PDC's failure to create a reserve fund from distributions to the limited partners to timely pay the Partnerships' alleged P&A liabilities, and then to use the Partnerships' lack of funds to pay P&A liabilities to pressure the Partnerships into bankruptcy is a breach of PDC's fiduciary duty to the Partnerships. Further, there is no provision in the West Virginia statutes that permits a general partner to delegate its duties of loyalty and care in the winding-up the affairs of the Partnerships to a third party such as Nicolaou.

24. *Third*, the Debtors' attempt to refute the claim that a complete lack of pressure

from external creditors is evidence that these bankruptcy cases were not filed as a litigation tactic. (DR Obj., ¶ 50.) But this ignores the very portions of the *Pottorff* decision that the Debtors cited to earlier. There, the court stated that: "… as the bankruptcy petition was filed without any pressure from those creditors, the only purpose of [appellant]'s filing was to *gain control of the state-court claims* that appellees are prosecuting derivatively on [appellant's] behalf." *Pottorff*, 518 B.R. at 384 (emphasis added). And, while the Debtors attempt to address the fact that PDC is an insider and the fact that there is no pressure from any outside creditors as distinct data points, they should be considered together. The absence of pressure from external creditors makes PDC's decision to hire Nicolaou "in connection with a potential bankruptcy filing," to obtain repayment of its own obligations to pay the P&A liabilities and to purchase the assets of the Partnerships through a bankruptcy sale, demonstrates the conflict of interest present in this case and is a violation of PDC's duties set forth in section 1.07 of the Partnership Agreements and West Virginia Code section 47B-4-4.

25. *Fourth*, the Debtors admit that *if* the Partnership Agreements required PDC to obtain the consent of the investor partners prior to the filing of the bankruptcy petitions, or before PDC was able to delegate its decision-making authority to Nicolaou, that would necessitate the conclusion that the filing of these bankruptcy cases was not authorized. (DR Obj., ¶ 51.) As shown below, the consent of the investor partners *was* required by section 6.03(b)(1)(2) and (3) or the Partnership Agreements and, therefore, a finding that the Petitions were not approved by a majority of the investor limited partners confirms that the Petitions were not duly authorized is appropriate.

26. *Fifth*, while insolvency is not a prerequisite for the filing of a chapter 11 bankruptcy petition, the fact that the Partnerships have sufficient capital to continue operating—

when considering the assets of PDC, the Debtors' sole managing general partner—further illustrates the bad faith present in these cases. It is black letter law that a general partner is liable for the debts of a partnership. *See Great Lakes Chem. Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376, 391 (D. Del. 2000) ("General partners in limited partnerships . . . are liable for the debts of the partnership"); *Belmont County Nat'l Bank v. Onyx Co.*, 350 S.E.2d 552, 554 (W. Va. 1986); *In re LJM2 Co-Investment, L.P.*, 866 A.2d 762, 772 (Del. Ch. 2004) ("The basic premise of limited partnership law is that general partners are personally liable for partnership obligations but limited partners are not.").

27. Not only is PDC's liability for the Partnerships' obligations imposed by law but is contractual and set forth in section 7.12 of the Partnership Agreements, which provides that the general partner is "liable for the debts and obligations of the Partnership." (LP Ex. 5 at 37-38.) Thus, PDC's assets must be considered when determining whether or not the Partnerships had sufficient capital to meet their obligations as they become due. *See, also,* 11 U.S.C. § 101(32)(B). In deposition testimony, Stump testified on behalf of PDC that it was solvent as of the date of the filing of the bankruptcy petitions, and that when PDC's assets are considered, both Partnerships were solvent under 11 U.S.C. § 101(32)(B) (LP Ex. 79, Stump at 36:18–38:25.) And, given that PDC possesses assets in excess of $4 billion (Motion to Dismiss, ¶ 60), it is more than capable of meeting the current alleged P&A obligations of the Partnerships without recourse to bankruptcy. PDC as managing general partner had and has the authority pursuant to sections 9.01, 9.02, and 9.03 of the Partnership Agreements to liquidate and wind-up the Partnerships. However, if PDC dissolved and wound-up the Partnerships itself, it would be obligated to pay the higher of cost or fair market value for undeveloped property and fair market value for developed property pursuant to sections 5.07(i)(1) and (2). This explains PDC's motive

in retaining Nicolaou as Responsible Party with sole authority to sell the Partnerships assets; in the Term Sheet Nicolaou sold the Partnerships' assets to PDC for less than the higher of cost or fair market value for undeveloped acreage and less than fair market value for developed properties.

28. PDC cannot deny the Partnerships own acreage in the Wattenberg Field that it is purchasing based on the transaction set forth in the Term Sheet. In the "Releases" section of the Term Sheet, on page 2, PDC admits that it is paying $2,360,000 to the limited partners of the Rockies Region 2006 Partnership and $2,920,000 to the limited partners of the 2007 Partnership to release their claims against PDC and Nicolaou. In footnote 1 on page 3 of the Term Sheet it confirms these amounts of $2,360,000 and $2,920,000 are being paid to the limited partners for releases based on $2.000 per acre. So, PDC acknowledges that the Rockies Region Partnership owns 1,180 acres of property in the Wattenberg Field ($2,360,000 ÷ 2,000 per acre = 1,180 acres) and that the 2007 Partnership owns 1,460 acres in the Wattenberg Field ($2,920,000 ÷ $2,000 per acre = 1,460 acres). Nicolaou has confirmed that she did no analysis of whether the Partnerships owned acreage in the Wattenberg Field, or the value of acreage in the Wattenberg Field (Nicolaou Deposition ("KN Depo.") at 83:4–14; *see also* LP Ex. 164 ("341A Transcript") at 47:3–21.) There is no evidence in the record that acreage in the Wattenberg Field was worth only $2,000 per acre on October 30, 2018. At PDC and Nicolaou's request, this Court excluded evidence of the current value of acreage in the Wattenberg Field adjacent to the Partnerships' wellbores.

B. <u>Nicolaou did not have authority to file the Debtors' bankruptcy petitions.</u>

i. PDC lacked the authority to appoint Nicolaou as Responsible Party under the terms of the Partnership Agreements and applicable West Virginia law.

29. As set forth in great detail in the Limited Partners' Motion to Dismiss, the question whether PDC had the requisite authority to appoint Nicolaou to file the Debtors' bankruptcy petitions is determined under applicable state law. *See In re Franchise Servs. of North America*, 891 F.3d 198, 206–07 (5th Cir. 2018) ("If petitioners lack authorization under such state law the bankruptcy court has no alternative but to dismiss the petition") (internal quotations omitted). In this case, PDC lacked the authority to delegate to Nicolaou, as the purported Responsible Party, the authority to file bankruptcy petitions on behalf of the Partnerships and to make "all material decisions" of the Partnerships, the authority that Nicolaou testified she possessed during her deposition. (KN Depo. at 36:12–37:3.) Also, Stump testified on behalf of PDC that the company delegated authority to make all material decisions on behalf of the Partnerships. (LP Ex. 79, Stump Depo. 221:24-222:25.)

30. Here, PDC, absent the consent of a majority of the limited partners as required by section 6.03(b)(1) and (2) of the Partnership Agreements, itself did not have authority to file the petitions on behalf of the Partnerships under the laws of West Virginia, or to delegate to Nicolaou as the alleged Responsible Party authority to file the petitions. As the Partnerships are West Virginia limited partnerships, West Virginia law applies to the authority of PDC to commence these bankruptcy cases. Section 47-9-18 of the West Virginia Code provides that a "partnership agreement may grant to all or a specified group of the limited partners the right to vote … upon any matter." Further, Section 47-9-24 subjects a general partner's rights and

powers to the provisions of the "Act," the partnership agreement and "the restrictions of a partner in a partnership without limited partners."

31. Under the Partnership Agreements, PDC's authority is limited to taking only those actions in pursuance of the purposes of the Partnerships. (*See* Section 6.02.) The stated business purposes of the Partnerships are "the acquisition and development of oil and gas properties, and the drilling for oil, gas, hydrocarbons and other minerals located in, on or under such properties." (Sec. 1.03.) As the Managing General Partner, PDC has "the sole and exclusive right and power to manage and control the affairs of the Partnership[s] and to operate [them] and to do all things necessary to carry on" the Partnership businesses for these purposes. (Section 6.01.) *See Miltland Raleigh-Durham v. Myers*, 807 F. Supp. 1025, 1040–43, 1059 (S.D.N.Y. 1992) (concluding that general partner abdicated his responsibilities as general partner by delegating his duties to another entity in violation of limited partnership agreement).

32. But PDC is specifically precluded, absent the prior consent of the majority of the limited partners, from taking actions not in furtherance of these purposes, i.e. outside their ordinary business; for instance, selling substantially all of the Partnerships' assets and from taking "any other act which would make it impossible to carry on the ordinary business of the Partnership," or "[b]inding or obligat[ing] the Partnership with respect to any matter outside the scope of the Partnership business." (Section 6.03(b) and (d).) Accordingly, despite PDC's argument that it "has the authority to do what it deems necessary for the partnership" (PDC Obj., ¶ 70), there are explicit limits on PDC's authority in section 6.03 of the Partnership Agreements.[2]

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[2] To the extent the Partnership Agreements are ambiguous as to PDC's powers, such ambiguities must be construed against PDC. *See Dieckman v. Regency GP LP*, 155 A.3d 358, 366–67 (Del. 2016) ("in the case of an ambiguous partnership agreement of a publicly traded partnership, ambiguities are resolved … to give effect to the reading that best fulfills the reasonable

33. Contrary to Debtors and PDC's assertions, the filing of the bankruptcy petitions on behalf of the Partnerships is certainly not an act to "carry on" the Partnerships' business purposes, i.e. the acquisition and development of oil and gas properties, and the drilling for oil, gas, hydrocarbons and other minerals located in, on or under such properties. (DR Obj., ¶ 66; PDC Obj., ¶ 71.) Courts have consistently held that the filing of a bankruptcy petition does not constitute an act in the ordinary course of an entity's business. *See In re Mid-South Bus. Assocs., LLC*, 555 B.R. 565 (Bankr. N.D. Miss. 2016) (dismissing limited liability company's chapter 11 case where manager failed to obtain affirmative vote of membership interests though act of filing bankruptcy petition was not an enumerated action explicitly requiring such vote required under operating agreement since such filing was outside the ordinary course of business); *In re SWG Assocs.*, 199 B.R. 557, 559–60 (Bankr. W.D.Pa. 1996) (partnership's chapter 11 filing was unauthorized since partnership agreement required partners' unanimous consent for acts that would make it impossible to carry on the ordinary business of the partnership, concluding "a bankruptcy filing is not an act which is done for the purpose of carrying on the business of a partnership in the usual way."); *In re Ranch*, 492 B.R. 545, 548–50 (Bankr. D.Or. 2013) (finding

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expectations an investor would have had from the fact of the agreement. The reason for this is simple. When investors buy equity in a public entity, they necessarily rely on the text of the public documents and public disclosures about that entity, and not on parol evidence."), citing, *Bank of New York Mellon v. Commerzbank Capital Funding Trust II,* 65 A.3d 539, 551–52 (Del. 2013) (construing an agreement against the drafter to give effect to the "investors' reasonable expectation" using a species of the *contra proferentem* doctrine); *see also SI Mgmt. L.P. v. Wininger,* 707 A.2d 37, 42–44 (Del. 1998) (holding that ambiguities in a limited partnership agreement should be construed against the general partner unless all participants engaged in individualized negotiations). Note that, where there is no controlling West Virginia authority, West Virginia courts "treat[] Delaware law as strongly persuasive" on issues relating to corporate governance. *In re Portec Rail Prods.*, No. G.D. 10-3547, 2010 Pa. Dist. & Cnty. Dec. LEXIS 157, at *25–26 (C.P. Apr. 21, 2010); *see also, e.g., Persinger v. Carmazzi*, 441 S.E.2d 646 (W. Va. 1994) (applying Delaware law).

that "[f]ling a voluntary bankruptcy case is a paradigm action outside the ordinary course of partnership business," and dismissing chapter 12 case where no provision of partnership agreement superseded Oregon law requiring unanimous partner consent for acts outside ordinary course of business.); *DB Capital Holdings, LLC v. Aspen HH Ventures, LLC (In re DB Capital Holdings, LLC)*, 2010 Bankr. LEXIS 4176, at *10–19 (10th Cir. B.A.P. 2010) (affirming case dismissal as filing was not authorized under LLC operating agreement, stating, "[f]iling of Chapter 11 proceeding, with the attendant ... statutory duties placed on debtors-in-possession, and thus their management, essentially makes it impossible to conduct and operate a business as it was being conducted immediately before the filing of the petition."); *In re Avalon Hotel Partners, LLC*, 302 B.R. 377, 380 (Bankr. D. Or. 2003) (decision to file bankruptcy is one outside of the ordinary course of business, and absent member approval was unauthorized); *see also Squire Court Partners Ltd. P'ship v. Centerline Credit Enhanced Partners LP Series J (In re Squire Court Partners Ltd. P'ship)*, 574 B.R. 701, 708–09 (E.D. Ark. 2017) (affirming dismissal of limited partnership chapter 11 case were partnership agreement required unanimous consent of partners of petition); *Sung Ho Kim v. Parklane, Inc.*, 2010 U.S. Dist. LEXIS 17991 at *9–10 (D.N.J., March 1, 2010) (filing of voluntary petition is not an action done for the purpose of carrying on the ordinary business of a partnership [or corporation") (citation omitted); *Green Bridge Capital S.A. v. Shapiro (In re FKF Madison Park Group Owner,* LLC), 2011 Bankr. LEXIS 344 at *8–10 (Bankr. D. Del., Jan. 11, 2011) (recognizing that placing an LLC into bankruptcy clearly exceeds the entity's ordinary business activities and that operating agreements' terms were dispositive of whether entity's bankruptcy was authorized).

34. As the act of authorizing the filing the bankruptcy petitions did not constitute an act in furtherance of carrying on the Partnerships' business purposes, such act was beyond

PDC's authority under the Partnership Agreements and West Virginia law. It deprived the Partnerships' limited partners of their right to vote on those matters identified in section 6.03 of the Partnership Agreements that impacted the Partnerships' business purposes, and well exceeded the scope of PDC's management powers to carry on those purposes.

35. In his deposition, Stump testified on behalf of PDC that the Partnership Agreements were meant to govern the business of the Partnerships. (LP 79, Stump at 22:20–23:4.) Stump also testified that Nicolaou, in operating the Partnerships, was required to comply with the terms of the Partnership Agreements in winding up the Partnerships and divesting their assets. (LP 79, Stump Depo. 193:15-194:11.) Stump further testified that, under section 9.02 of the Partnership Agreements, PDC (as the managing general partner) has the power to liquidate the Partnerships. (LP 79, Stump at 119:8–20.) Section 9.02 provides that:

> Upon a dissolution and final termination of the Partnership, the Managing General Partner, or in the event there is no Managing General Partner, any other person or entity selected by the Investor Partners (hereinafter referred to as a "Liquidator") shall cause the affairs of the Partnership to be wound up and shall take account of the Partnership's assets (including contributions, if any, of the Managing General Partner pursuant to Section 3.01(e) herein) and liabilities, and the assets shall, subject to the provisions of Section 9.03(b) herein, be liquidated as promptly as is consistent with obtaining the fair market value thereof, and the proceeds therefrom (which dissolution and liquidation may be accomplished over a period spanning one or more tax years in the sole discretion of the Managing General Partner or Liquidator), to the extent sufficient therefor, shall be applied and distributed in accordance with Section 9.03.

(LP Ex. 5 at 41.)

36. Moreover, section 9.03 of the Partnership Agreements states that the task of winding up the affairs of the Partnerships could *only* be conducted by PDC or by a "Liquidator"

that was selected by the investor partners: "The winding up of the affairs of the Partnership and the distribution of its assets shall be conducted exclusively by the Managing General Partner or the Liquidator, who is hereby authorized to do any and all acts and things authorized by law for these purposes." (LP Ex. 5 at 41-42; *see also* LP Ex. 79, Stump at 120:12–20.) PDC admits that it did not offer the investor partners the opportunity to select Nicolaou as "Liquidator" because PDC believed, contrary to the express terms of the Partnership Agreements, that it was within its authority to hire Nicolaou. (LP Ex. 79, Stump at 136:6–137:5.)

37. Importantly, Nicolaou's engagement was not approved by a written resolution of PDC's board of directors. (LP 79, Stump at 135:11–136:2.)

38. Finally, PDC's delegation to Nicolaou to act as the purported responsible party for the Partnerships violates the long-established doctrine of *delectus personae* adopted by West Virginia courts. That doctrine holds that "when personal relations are important, a person cannot be compelled to associate with another person." *Warner v. Warner*, 480 B.R. 641, 657 (Bankr. N.D. W. Va. 2012) (quoting Black's Law Dictionary 459 (8th ed. 2004)). In the partnership context, *delectus personae* holds that a party cannot join a partnership without the consent of all the partners. *Id.*; *Blackmarr v. Williamson*, 50 S.E. 254, 255 (W. Va. 1905). This applies even in bankruptcy. *See Valentine v. Sugar Rock, Inc.*, 766 S.E.2d 785, 794 (W. Va. 2014) ("By the same token, at common law a stranger to the general partnership (like a bankruptcy trustee) could not join the enterprise without the unanimous assent of all of the partners."); *Warner*, 480 B.R. at 641 ("supplanting a [partnership or LLC] debtor already grinds the notion of *delectus personae*"). As such, PDC cannot appoint Nicolaou to make material decisions for the Partnerships and manage their affairs, essentially acting as a managing general partner, without the consent of the limited partners.

ii. Nicolaou failed to conduct sufficient due diligence prior to the filing of the Partnerships' bankruptcy petitions.

39. Nicolaou failed to conduct sufficient due diligence in violation of the Business Judgment Rule. Nicolaou testified at the Debtors' meeting of creditors that PDC was "arguably" required to assign 32-acre spacing units, however she entered into a Term Sheet with PDC prior to the filing of bankruptcy petitions in which she agreed to sell all of the Debtors' oil and gas interests to PDC for only the value of the wellbores. Nicolaou's counsel has admitted that the Partnership Agreements were "ambiguous" as to what interests PDC was required to assign to the Partnerships. [Doc. 141 at ¶ 19] Under West Virginia law, ambiguities in a written document are construed against the drafter of the agreement. *Lee v. Lee*, 721 S.E.2d 53, 57 (W. Va. 2011); *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909, 924 n.61 (W. Va. 2011). It is undisputed that PDC caused the Partnership Agreements to be drafted which contained the ambiguous language as to what interest in leases, spacing units, or Prospects PDC was to assign to the Partnerships.

40. Likewise, Nicolaou testified that she made no effort prior to entering into the Term Sheet with PDC to evaluate the strength of the derivative claims asserted in the *Dufresne* action.

iii. Nicolaou's employment by PDC constitutes a conflict of interest that precludes her from serving as an independent fiduciary on behalf of the Partnerships.

41. The Bridgepoint engagement letter specifically states that Nicolaou was to be an "independent fiduciary" for the Partnerships:

> As Responsible Party and independent fiduciary for the Partnerships, Nicolaou will serve as the authorized representative for each of the Partnerships with authority to oversee the Partnerships in determining the best course action to wind-down

> the Partnerships, including overseeing all actions in connection with a potential bankruptcy filing or an auction sale of the Partnerships' assets.

(LP Ex. 7.) Because PDC requested, and Nicolaou agreed, that she would serve as an "independent fiduciary" for the Partnerships, the Court, in evaluating Nicolaou's application to be appointed as Responsible Party, should apply the standards set forth in Bankruptcy Code section 327, and not Bankruptcy Code sections 105 or 363.

42. Nicolaou compromised her independence as Responsible Party to act as an "independent fiduciary" in the best interests of the Debtor Partnerships by agreeing to a provision of the Term Sheet that none of the $3 million "Administrative Reserve," to be funded by PDC to pay administrative costs of the Debtor Partnerships' chapter 11 cases, could "be used to pay or reimburse fees, costs, expenses, incurred in connection with actions that (i) oppose the transactions set forth herein, or (ii) adverse to or otherwise challenge [PDC's] legal or equitable rights or interests. Notwithstanding funding of the Administrative Reserve, [PDC] shall retain the right to contest any motion or application for approval of an administrative expense." (LP Ex. 125.)

43. The Term Sheet prohibited Nicolaou, at the risk of not being paid, from taking any action in the bankruptcy proceedings "adverse to or otherwise challenge [PDC's] legal or equitable interests" and was incorporated in the Chapter 11 Plan filed by Nicolaou. The effect of this provision in the Term Sheet and Plan is that Nicolaou agreed, in advance of filing the petitions for the Debtor Partnerships, that her entitlement to fees for herself and her attorneys in these bankruptcy cases was conditioned upon her not taking any position on behalf of the Debtor Partnerships adverse to or otherwise challenging PDC's position that it was entitled to the 32-acre spacing units purchased with the limited partners' funds.

44. Nicolaou's attorneys, Grey Reed & McGraw, advised her in connection with the negotiations of the Term Sheet. Grey Reed & McGraw will only be paid legal fees from the Administrative Reserve established by PDC for their representation of Nicolaou in these bankruptcy proceedings if Nicolaou does not take any position "adverse to or otherwise challenge" PDC's "legal or equitable rights or interests" in these proceedings. Because of that actual conflict, Grey Reed & McGraw cannot provide disinterested legal advice as to what is in the best interest of the Debtor Partnerships.

CONCLUSION

Based on the foregoing and the evidence to be adduced at hearing, the Limited Partners submit that (1) these bankruptcy cases must be dismissed as the filing of the bankruptcy petitions were not authorized in accordance with the Partnerships' respective Partnership Agreements and applicable West Virginia law, or, alternatively, based on cause pursuant to 11 U.S.C. § 1112(b)(1) on the basis that they were filed in bad faith, (2) with regard to the dismissal of these cases, the Court bar the filing of any future bankruptcy petitions on behalf of the Partnerships absent the requisite consent of the Partnerships' limited partners in accordance with the Partnership Agreements and applicable West Virginia law, and (3) in the event the Court determines that dismissal of these cases is not appropriate that it appoint a Chapter 11 trustee in these cases in accordance with 11 U.S.C. § 1112(b)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *LIMITED PARTNERS' TRIAL BRIEF IN SUPPORT OF AMENDED MOTION TO DISMISS* was served on the party below via the Court's ECF filing system, on the 10th day of June 2019:

/s/ Thomas G. Foley
Thomas G. Foley