IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

NOBLE ENERGY, INC.,

Applicant,

v.

CONOCOPHILLIPS CO.,

Respondent.

APPLICATION TO THE HON. SAMUEL A. ALITO, JR. FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

Pursuant to Supreme Court Rule 13(5), Noble Energy, Inc. hereby moves for an extension of time of 32 days, to and including Monday, April 16, 2018, for the filing of a petition for a writ of certiorari to review the decision of the Texas Supreme Court dated June 23, 2017 (Exhibit 1). A petition for rehearing was denied December 15, 2017 (Exhibit 2). The jurisdiction of this court is based on 28 U.S.C. §1257(a).

1. Unless an extension is granted, the deadline for filing the petition for certiorari will be Thursday, March 15, 2018.

2. This case involves two important questions of federal bankruptcy law: (1) whether a state court may override the disclosure requirements of federal bankruptcy law using state contract-law principles; and (2) whether a generic "assumed-unless-rejected" clause in a bankruptcy confirmation plan satisfies 11 U.S.C. §365(f)(2)'s requirement that an executory contract be expressly assumed.

3. In 1994, ConocoPhillips and Alma Energy Corp. entered into an Exchange Agreement, pursuant to which they swapped oil and gas interests and agreed to indemnify the other party for any environmental claims concerning the properties received. Five years later, Alma filed for Chapter 11 bankruptcy. During bankruptcy proceedings, Noble agreed to purchase certain assets of Alma pursuant to an Asset Purchase Agreement (APA). Under the APA, Noble purchased assets "described in Exhibit 'A,'" which included the properties Alma had received from ConocoPhillips under the Exchange Agreement. Noble also agreed to buy Alma's interests in "all … agreements … associated with" those assets, "including but not limited to, those Material Contracts … described on Exhibit 'D.'" Ex. 1 at 3. The APA provided that Noble was "not assuming any liability … related to the Assets of any kind or description whatsoever," except, as relevant here, "all duties and obligations which accrue or arise from and after [closing], including without limitation the obligation [to] … perform obligations under any executory contracts … expressly assumed hereunder … to the extent any such obligation or liability is attributable to events or periods of time after [closing]." Ex. 1 at 4 (brackets and first ellipsis in original).

4. The APA did not identify the Exchange Agreement as a purchased asset (on Exhibit A) or as a "Material Contract" associated with a purchased asset (on Exhibit D). In fact, Alma *never* disclosed the Exchange Agreement—or its indemnification obligation—during the bankruptcy proceedings. The bankruptcy court approved the APA's terms and Alma's reorganization plan. The plan provided

that executory contracts not specifically listed on a given schedule were to be "assumed [by Alma] and assigned to [Noble]" unless rejected by Alma at closing. Ex. 1 at 5 (second alteration in original). The schedule of executory contracts did not list the Exchange Agreement, and Alma never rejected the Exchange Agreement.

5. Years later, in 2010, ConocoPhillips settled a suit involving environmental damage at one of the properties it had conveyed to Alma in the Exchange Agreement. It then sought $63 million in indemnification from Noble and sued for breach of the Exchange Agreement when Noble refused. A Texas trial court granted summary judgment to Noble. A court of appeals reversed, and the Texas Supreme Court granted Noble's petition for review.

6. In a sharply divided opinion, the Texas Supreme Court affirmed. After holding that the Exchange Agreement was an executory contract, the majority held that Alma assumed the Exchange Agreement and assigned it to Noble under the APA. In the majority's view, the Exchange Agreement was "associated with [the] assets Noble bought" and was thus among the interests Noble purchased. Ex. 1 at 11. The majority acknowledged that the Exchange Agreement was never "mentioned in any way in the bankruptcy proceeding." *Id.* at 20. It nevertheless deferred to the "assumed-unless-rejected" language of the reorganization plan, and it rejected Noble's argument that "full disclosure in bankruptcy proceedings is essential." *Id.* at 21. "As critical as disclosure in bankruptcy proceedings may be," the majority concluded, it is "more critical that parties to bankruptcy proceedings and others have

confidence that reorganization plans and court orders will be interpreted and enforced according to their plain terms." *Id*..

7. Justice Johnson, joined by two others, dissented. Justice Johnson criticized the majority's holding as "counter to the position of federal courts requiring full and complete disclosure" in bankruptcy proceedings. *Id*. at 27. The majority's approach, Justice Johnson maintained, transforms bankruptcy proceedings into a "matter of gamesmanship" turning on "how opaque … a debtor's filings and disclosures can be and how many omissions can be made without consequences to the debtor seeking relief and other parties such as [ConocoPhillips] with knowledge of the opaqueness." *Id*. Justice Johnson further observed that, under established bankruptcy law, "general plan language" like that in Alma's plan "does not effect assumption of an undisclosed executory contract … and then its assignment." *Id.* at 25. Finally, by prejudicing Noble and benefiting the direct parties to the Exchange Agreement—ConocoPhillips and Alma—the majority's decision was "manifestly inequitable." *Id*. at 28.

8. The Texas Supreme Court's decision is deeply flawed and in conflict with federal bankruptcy law. It is undisputed that during bankruptcy proceedings, Alma never disclosed the Exchange Agreement—including the substantial, perpetual indemnification obligation at issue here. The Texas Supreme Court acknowledged that disclosure in bankruptcy proceedings is "critical," yet, without citing any authority, dismissed the nondisclosure of the indemnity obligation as less critical than enforcing the plain language of bankruptcy plans and confirmation orders. In

contrast, other federal and state courts recognize complete disclosure as the *sine qua non* of bankruptcy.

9. The Texas Supreme Court compounded its error and created a conflict with federal courts in holding that general, catch-all, "assumed-unless-rejected" provisions in bankruptcy plans can apply to undisclosed executory contracts like the Exchange Agreement. *See In re O'Connor*, 258 F.3d 392, 401 (5th Cir. 2001) (holding that "an executory contract may not be assumed either by implication or through the use of boilerplate plan language" (emphasis omitted)). Blanket assumption of undisclosed executory contracts is "inconsistent with" 11 U.S.C. §365(a), which requires bankruptcy court approval of a debtor's assumption or rejection of any executory contract. *Id.*

10. Applicant's Counsel of Record, Paul D. Clement, was not involved in the proceedings below and requires additional time to research the extensive factual record and complex legal issues presented in this case. Furthermore, before the current due date of the petition, Mr. Clement has substantial briefing and oral argument obligations, including a response to petition for rehearing en banc in *Oracle USA, Inc. v. Rimini Street, Inc.*, No. 16-16832 (9th Cir.) (due February 14); a reply brief in *Archdiocese of Washington v. WMATA*, et al., No. 17-7171 (D.C. Cir.) (due February 16); oral argument in *Holland v. Rosen*, No. 17-3104 (3d Cir.) (February 21); an opening brief in *WesternGeco LLC v. ION Geophysical Corp.*, No. 16-1011 (U.S.) (due February 26); an opening brief in *Ultra Petroleum Corp., et al. v. Ad Hoc Comm. of Unsecured, et al.*, No. 17-20793 (5th Cir.) (due February 26); a reply brief

in *Exelon Corp. v. CIR,* No. 17-2964 (7th Cir.) (due March 9); and an opening brief *in Ramirez v. Trans Union LLC*, No. 17-17244 (9th Cir.) (due March 12).

For the foregoing reasons, applicants request that an extension of time to and including Monday, April 16, 2018, be granted within which applicant may file a petition for a writ of certiorari.

Respectfully submitted,

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