APPENDIX

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Appendix A

IN THE SUPREME COURT OF TEXAS

No. 15-0502

NOBLE ENERGY, INC.,

Petitioner,

v.

CONOCOPHILLIPS COMPANY,

Respondent.

On Petition for Review from the Court of Appeals for the Fourteenth District of Texas

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June 23, 2017

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE WILLETT, JUSTICE BOYD, JUSTICE DEVINE, and JUSTICE BROWN joined.

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE GREEN and JUSTICE GUZMAN joined.

JUSTICE LEHRMANN did not participate in the decision.

The principal question in this case is whether, under the terms of a bankruptcy court order confirming a plan of reorganization and an agreement for sale of the debtor's assets, the purchaser was assigned an undisclosed contractual indemnity

obligation of the debtor. We agree with the court of appeals[1] that the answer is yes and therefore affirm.

I.

Conoco[2] and Alma swapped oil and gas interests in 1994 under an Exchange Agreement in which each accepted responsibility and indemnified the other for any environmental claims related to the properties received, no matter who caused the injury or when, whether before the swap or after.[3] The agreement

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[1] 462 S.W.3d 255 (Tex. App.—Houston [14th Dist.] 2015).

[2] For simplicity, we refer to respondent ConocoPhillips Co. and its predecessors as "Conoco"; petitioner Noble Energy, Inc. and its predecessors as "Noble"; Alma Energy Corp. as "Alma"; Alma and Noble's asset purchase and sale agreement as "the APA"; Alma's plan of reorganization in bankruptcy as "the Plan"; and the bankruptcy court's order confirming the Plan and the APA as "the Order". We focus on the terms of these three documents and direct the reader to the court of appeals' opinion for a thorough recitation of the facts of the case. *Id.* at 258-263.

[3] Section VII(c) provides: "Assignee assumes full responsibility for, and agrees to release, indemnify, hold harmless and defend Assignor, its agents, officers, and employees from and against all loss, liability, claims, fines, expenses, costs (including attorney's fees and expenses) and causes of action caused by or arising out of any federal, state or local laws, rules, orders and regulations applicable to any waste material or hazardous substances on or included with the Assets or the presence, disposal, release or threatened release of all waste material or hazardous substance from the Assets into the atmosphere or into or upon land or any water course or body of water, including ground water, whether or not attributable to Assignor's activities or the activities of Assignor's officers, employees or agents, or to the activities of third parties (regardless of whether or not Assignor was or is aware of such activities and regardless of any claimed negligence in whole or in part attributable to Assignor) prior to, during or after the period of Assignor's ownership of the Assets. This

provided that the mutual indemnities would "survive ... the transfer of the Assets".[4] Each party's recorded assignment effectuating the transfers was expressly "made subject to that certain Exchange Agreement dated June 14, 1994, between [Conoco] and Alma", set out the indemnity obligation,[5] and provided

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indemnification and assumption shall apply to liability for voluntary environmental response actions undertaken pursuant either to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), as such may be amended from time to time, or to any other federal, state or local law."

[4] Exchange Agreement § XII(m).

[5] Conoco's assignment to Alma stated: "[Alma] has agreed and does hereby agree to indemnify and defend Assignor, Assignor's subsidiary and affiliated companies, and its or their respective agents, officers, employees, successors, and assigns, from and against all claims, demands, causes of action, or liability of any nature or kind, including (without limitation) civil fines, penalties, costs of cleanup, or plugging liabilities, brought by any and all persons, entities, or governmental agencies including (without limitation) [Alma's] or [Conoco's] employees, agents, or representatives and also including (without limitation) any private citizens, persons, organizations, and any agency, branch or representative of federal, state or local government, on account of any personal injury, death, damage, destruction, loss of property, or contamination of natural resources (including soil, air, surface water or ground water) resulting from or arising out of any liability caused by or connected with the presence, disposal or release of any material of any kind, including, without limitation, asbestos and/or NORM, in, under, or on the Leases at the time of this Assignment, or thereafter caused by acts of [Alma's] employees, representatives, or agents with regard to use of the Leases, wells, or equipment subsequent to this assignment, without regard to whether such liability, injury, death, damage, destruction, loss, or contamination is caused in whole or in part by any claimed negligence, active or passive, on the part of [Conoco] or other indemnified person or entity. To the extent

that it would be a "covenant[] running with the lands, [l]eases, and interests" assigned and would "extend to, bind and inure to the benefit of the parties ... , their heirs, successors and assigns."

In 1999, Alma filed for protection under Chapter 11 of the Bankruptcy Code.[6] Conoco was a party to the bankruptcy proceeding. After a court-approved auction in 2000, Noble and Alma entered into the APA. Noble agreed to buy "[t]he oil and gas leases, mineral interests, and other significant Assets described in Exhibit 'A'",[7] which included the properties Alma had received from Conoco under the Exchange Agreement. Noble also agreed to buy "[a]ll [Alma's] rights and interests in and to all ... agreements ... in any way associated with the Assets, including but not limited to, those Material Contracts ... described on Exhibit 'D'",[8] including "[a]ny agreement of ... indemnification by [Alma] outside of the ordinary course of business".[9] The Exchange Agreement, though "associated with the Assets", is not listed in either Exhibits A or D, nor was it listed in Alma's disclosures or mentioned in any way in the bankruptcy proceeding. Noble contends it had no actual knowledge of the agreement, though it certainly had constructive knowledge from the

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there is any conflict between this Assignment and the Exchange Agreement, the latter Agreement shall prevail."

[6] 11 U.S.C. §§ 1101-1146.

[7] APA § 1.01(a).

[8] APA § 1.01(d).

[9] APA § 3.01(c)(v).

reference in Conoco's assignment to Alma of the leases Noble was purchasing.[10]

The APA does not list the Exchange Agreement among Noble's "Assumed Liabilities",[11] but section 8.03 states that Noble

> assumes all duties and obligations as the owner of the Assets which accrue or arise from and after [closing], including without limitation the obligation [to] ... (iii) perform obligations under any executory contracts or unexpired oil and gas leases expressly assumed hereunder, and (iv) to comply with any [consent decrees or laws], and to comply with any [laws] to the extent that any such obligation or liability is attributable to events or periods of time after [closing].[12]

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[10] *See*, *e.g.*, *Cooksey v. Sinder*, 682 S.W.2d 252, 253 (Tex. 1984) (per curiam) ("A purchaser is charged with knowledge of the provisions and contents of recorded instruments."); *Carr v. Oaktree Apartments*, 46 So. 3d 793, 797 (La. Ct. App. 2010) ("Third persons are deemed to have constructive knowledge or notice of the existence and contents of recorded instruments affecting immovable property."); *McCurdy v. Bloom's Inc.*, 907 So. 2d 896, 899 (La. Ct. App. 2005) (same); *Voelkel v. Harrison*, 572 So. 2d 724, 726-727 (La. Ct. App. 1990) (same); *see also* TEX. PROP. CODE § 13.002(1) ("An instrument that is properly recorded in the proper county is ... notice to all persons of the existence of the instrument ...."); LA. CIV. CODE ANN. art. 3338 (2017) ("rights and obligations established or created" by certain written instruments "are without effect as to a third person unless the instrument is registered by recording it in the appropriate mortgage or conveyance records").

[11] APA § 1.04.

[12] APA § 8.03(b).

Executory contracts are specially treated under Section 365 of the Bankruptcy Code.[13] As we discuss more fully below, the parties disagree over whether the Exchange Agreement is an executory contract and whether it was expressly assumed. In any event, Noble argues, section 8.03 refers only to post-closing obligations.[14] Except as provided by section 8.03, Noble did not "assum[e] any liability of [Alma] or related to the Assets of any kind or description whatsoever."[15]

The APA excused Noble from closing unless "[t]he Plan materially conforms to the terms and conditions of this Agreement, ... and the Plan and any modifications thereto have been consented to by [Noble] in writing".[16] The Plan authorizes "[a]ll transfers of assets anticipated or provided for under the [APA]".[17] The Plan contains several provisions regarding executory contracts but does not mention the Exchange Agreement. Section 10.8 of the Plan provides that executory contracts not specifically referenced were to be "assumed and assigned to [Noble]" unless rejected at closing.[18] Section 10.9 of the Plan states:

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[13] 11 U.S.C. § 365.

[14] Noble points out that under APA Section 8.04, Alma is responsible for asserted liabilities "arising from any injury or occurrence prior to [closing]". APA § 8.04(b)(ii).

[15] APA § 1.06.

[16] APA § 6.01(g).

[17] Plan § 12.8.

[18] Plan § 10.8.

> Exhibit "J" ... reflects certain agreements, some of which may or may not be binding contracts and may or may not be Executory Contracts, which shall be rejected by [Alma at closing]. By no later than July 28, [Noble] shall notify [Alma] of any ... executory contracts which are not set forth on Exhibit "J" and which [Noble] elects not to have assumed and assigned to it by [Alma]. All ... executory contracts which are not (i) rejected or the subject of a motion to reject as of the Confirmation Hearing, (ii) on Exhibit "J" or (iii) on the list provided by [Noble] to [Alma] ... pursuant to this section, shall be assumed by [Alma] and assigned to [Noble].[19]

Alma did not reject the Exchange Agreement in any way permitted by the Plan.

The bankruptcy court's Order, issued in 2000, "approved and confirmed in all respects" the Plan and the APA.[20] Paragraph 15 of the Order provides:

> Except for those contracts and agreements that have either already been assumed or rejected, those Executory Contracts ... proposed to be assumed and assigned to [Noble] pursuant to the Plan are ordered assumed and assigned to [Noble] .... Those Executory Contracts ... proposed to be rejected pursuant to the Plan ... are ordered rejected .... [Noble has] provided adequate

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[19] Plan § 10.9.

[20] Order ¶ 1.

> assurance of future performance of all Executory Contracts ... being assumed and assigned to it.[21]

After the bankruptcy proceeding concluded, Noble acted as if it had assumed the Exchange Agreement. In 2008, it decommissioned an obsolete tank battery on the property it had received from Conoco under the agreement. In 2011, Noble agreed to indemnify and defend Conoco under the Exchange Agreement in two environmental contamination lawsuits, one filed in 2004 and the other in 2008. But in a third suit, filed in 2010, Noble refused to indemnify Conoco under the Exchange Agreement.

Conoco sued Noble for breach of the Exchange Agreement to recover the $63 million it paid to settle the 2010 suit. Both sides moved for summary judgment. The trial court denied Conoco's motion, granted Noble's, and severed the summary judgment from other claims, making it appealable. The court of appeals reversed and rendered summary judgment for Conoco, holding that the Exchange Agreement was an executory contract that was assumed by Alma and assigned to Noble in the bankruptcy proceeding.[22] The court remanded the case to the trial court for further proceedings.[23]

We granted Noble's petition for review.[24]

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[21] Order ¶ 15.

[22] 462 S.W.3d 255, 259, 275-276 (Tex. App.—Houston [14th Dist.] 2015).

[23] *Id.*

[24] 59 Tex. Sup. Ct. J. 1593 (Sept. 2, 2016).

II.

Because several of the provisions of the APA, Plan, and Order that we must interpret apply to executory contracts, we consider first whether the Exchange Agreement qualifies. Section 365 of the Bankruptcy Code authorizes a bankruptcy trustee to assume or reject executory contracts and prescribes how that authority is to be exercised.[25] Although the statute does not include a definition, the United States Supreme Court has stated that "Congress intended the term to mean a contract 'on which performance is due to some extent on both sides.'"[26] The Fifth Circuit has phrased the test this way: "an agreement is executory if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party."[27] A debtor-in-bankruptcy's executory contracts present special issues in handling the estate. As the Third Circuit has explained:

> Executory contracts in bankruptcy are best recognized as a combination of assets and liabilities to the bankruptcy estate; the performance the nonbankrupt owes the debtor constitutes an asset, and the

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[25] 11 U.S.C. § 365.

[26] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984) (citation omitted).

[27] *Phoenix Expl., Inc. v. Yaquinto (In re Murexco Petroleum, Inc.)*, 15 F.3d 60, 62-63 & n.8 (5th Cir. 1994) (citing Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 458-462 (1973); Vern Countryman, *Executory Contracts in Bankruptcy: Part II*, 57 MINN. L. REV. 479 (1974)).

> performance the debtor owes the nonbankrupt is a liability. The debtor (or trustee that has stepped into the debtor's shoes) may elect to assume an executory contract, in which case § 365 mandates that the debtor accept the liability with the asset and fully perform his end of the bargain.[28]

The Exchange Agreement did two things: it provided for a swap of assets between Conoco and Alma, and it mutually obligated them to indemnify each other for all environmental contamination claims related to the properties received. The indemnity obligation covered all claims of contamination, regardless of when it occurred—whether before or after the agreement—and who was at fault—even if the indemnitee. The property transfers were completed immediately, but the mutual indemnity obligations survived. At the time Alma filed for bankruptcy protection, either party could summon the other to perform on its indemnity. Courts have uniformly held that contracts imposing ongoing indemnity obligations contingent on future events are executory.[29] Noble cites no case to the contrary, and we have found none.

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[28] *Enter. Energy Corp. v. United States (In re Columbia Gas Sys., Inc.)*, 50 F.3d 233, 238 (3d Cir. 1995).

[29] *See Otto Preminger Films, Ltd. v. Qintex Entm't, Inc. (In re Qintex Entm't, Inc.)*, 950 F.2d 1492, 1496 (9th Cir. 1991); *Lubrizol Enters. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046 (4th Cir. 1985); *In re Abitibibowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009); *In re Safety-Kleen Corp.*, 410 B.R. 164, 166-168 (Bankr. D. Del. 2009); *Philip Servs. Corp. v. Luntz (In re Philip Servs. (Del.) Inc.)*, 284 B.R. 541, 547-550 (Bankr. D. Del. 2002); *Waldschmidt v. Metro. Lincoln-Mercury, Inc. (In re*

Rather, Noble argues that the essence of the Exchange Agreement was the property swap, that the mutual indemnities were tangential, that the parties substantially performed the agreement when the property interests were assigned, and that the remaining indemnity obligations, contingent on future events, did not make the agreement executory. Noble cites two cases in support of its argument. One, *In re Interstate Bakeries Corp.*, involved the sale of a business and its assets along with a license agreement authorizing the buyer's perpetual, exclusive, and royalty-free use of the seller's trademark.[30] The court concluded that the "essence of the agreement" was the sale of the business, not merely the licensing of the seller's trademark, especially when it concerned only one of the assets sold.[31] Therefore, the court concluded, the license agreement was not executory.[32] The other case, *In re Exide Technologies*, similarly involved the sale of a business accompanied by a trademark license agreement obligating the seller to maintain quality standards and refrain from using the trademark.[33] The court concluded that the essence of the agreement was the sale of the business, not the trademark license, and therefore the license agreement was not

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Preston), 53 B.R. 589, 591 (Bankr. M.D. Tenn. 1985); *Hassett v. Revlon, Inc. (In re O.P.M. Leasing Servs., Inc.)*, 23 B.R. 104, 117 (Bankr. S.D.N.Y. 1982).

[30] *Lewis Bros. Bakeries, Inc. v. Interstate Brands Corp. (In re Interstate Bakeries Corp.)*, 751 F.3d 955, 961 (8th Cir. 2014).

[31] *Id.*

[32] *Id.*

[33] 607 F.3d 957, 963 (3d Cir. 2010).

executory.[34] As another court has observed, licensing agreements are "not ... universally considered executory contracts."[35] Rather, a court must "examine the unperformed duties and obligations of each party to determine the status of an agreement."[36] *Exide Technologies* and *Interstate Bakeries* concluded that the trademark licensing obligations were "minor" in the context of the entire agreement.[37]

The mutual indemnity obligations under the Exchange Agreement were in no sense minor or unrelated to the property swap. The indemnities were an important factor in the value of the properties transferred. With substantial performance, "the defects in performance do not prevent the parties from accomplishing the purpose of the contract."[38] The stated purpose of the Exchange Agreement was to transfer responsibility for the swapped parties as well as title. Any failure to perform the mutual indemnity obligations would deny the indemnitee the benefit of its bargain. When Alma filed for bankruptcy, the performance it owed Conoco under the Exchange Agreement was a liability, and the performance Conoco owed it was an asset. We agree with the court

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[34] *Id.* at 964.

[35] *Qintex Entm't, Inc.*, 950 F.2d at 1495.

[36] *Id.*

[37] *Exide*, 607 F.3d at 964; *Lewis Bros. Bakeries, Inc. v. Interstate Brands Corp. (In re Interstate Bakeries Corp.)*, 751 F.3d 955, 964 (8th Cir. 2014) (obligations under the license were relatively minor in the context of the agreement to sell operations and assets in certain territories) .

[38] *Matador Drilling Co. v. Post*, 662 F.2d 1190, 1195 (5th Cir. 1981).

of appeals that the Exchange Agreement was an executory contract.

III.

As for whether Alma assumed the Exchange Agreement and assigned it to Noble, the APA is less than perfectly clear. Noble agreed to buy Alma's assets listed in Exhibit "A".[39] The property interests Alma had acquired from Conoco were in that list.[40] Noble also agreed to buy "[a]ll [Alma's] rights and interests in and to all ... agreements ... in any way associated with" the purchased assets, "including but not limited to, those Material Contracts ... described on Exhibit 'D'".[41] Although the Exchange Agreement was not listed with such agreements in Exhibit "D" and does not fall within the general description of "Material Contracts", the interests Noble purchased were explicitly "not limited to" those listed in Exhibit "D" or described as "Material Contracts".[42] The Exchange Agreement was certainly associated with assets Noble bought. Conoco's assignment of leases to Alma was expressly subject to the Exchange Agreement and set out its indemnity provisions in detail. The Exchange Agreement was thus among the interests Noble purchased.

Alma's indemnity obligation under the Exchange Agreement was a liability, but the agreement was not included in the APA's list of Noble's "Assumed

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[39] APA § 1.01(a).

[40] APA Ex. A.

[41] APA § 1.01(d).

[42] APA § 1.01(d).

Liabilities".[43] Noble argues that it bought only the benefits of the Exchange Agreement and not the liabilities. Conoco responds that Section 365 of the Bankruptcy Code requires that executory contracts like the Exchange Agreement be purchased *cum onere*—with burdens as well as benefits. We need not resolve this dispute because Noble's argument is contrary to the APA.

> Under Section 8.03 of the APA, Noble agreed to
>
> assume[] all duties and obligations as the owner of the Assets which accrue or arise from and after [closing], including without limitation the obligation [to] ... (iii) perform obligations under any executory contracts or unexpired oil and gas leases expressly assumed hereunder, and (iv) to comply with any [consent decrees or laws], and to comply with any [laws] to the extent that any such obligation or liability is attributable to events or periods of time after [closing].[44]

Noble argues that its obligation to indemnify Conoco for the claims in the 2010 lawsuit accrued or arose when the obligation was created by the Exchange Agreement years before the bankruptcy proceeding. It cites a Third Circuit case, *In re Allegheny Health, Education and Research Foundation*, in which the purchaser of assets in bankruptcy—a number of hospitals—agreed to assume liability only for obligations arising after closing of the transaction.[45]

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[43] APA § 1.04.

[44] APA § 8.03(b).

[45] 383 F.3d 169, 172 (3d Cir. 2004).

The court held that hospital employees' accrued sick leave was a pre-closing obligation because "the collective bargaining agreements show[ed] that once the employees had accumulated sick leave, they had a right to the leave, albeit a right contingent on future illness, injury or retirement."[46] "A contingent obligation," the court wrote, "is, nonetheless, an obligation."[47] Likewise, Noble argues, the indemnity obligation under the Exchange Agreement, though contingent on a claim being made against Conoco, was nonetheless an obligation. But *Allegheny* held only that the obligation to pay employee benefits arose when employees had earned them, not when the collective bargaining agreements were executed. *Allegheny* does not support Noble's argument that a contingent obligation arises when it is created.

We have held that "a claim based on a contract that provides indemnification from liability does not accrue until the indemnitee's liability becomes fixed and certain."[48] Conoco's liability did not become fixed and certain until it settled the lawsuit in 2011 for $63 million. Noble also argues that the indemnity claim against Conoco in the 2010 suit was for contamination that occurred years before the Exchange Agreement was executed and thus not attributable to events following closing of the APA. But again, the indemnity obligation is attributable to the event that triggered it—the settlement of the 2010 suit, not the execution

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[46] *Id.* at 178.

[47] *Id.*

[48] *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 205 (Tex. 1999).

of the Exchange Agreement. The obligation accrued, arose, and was attributable to events that occurred long after the closing of the APA. Thus, it was assumed by Noble under Section 8.03 of the APA.

The Plan and Order reinforce this interpretation of the APA. Section 10.8 of the Plan provides that executory contracts not specifically referenced were to be "assumed and assigned to [Noble]" unless rejected at closing.[49] Section 10.9 required Noble to notify Alma by a certain date of its election not to have specific executory contracts assumed and assigned to it. "All ... executory contracts ... not ... rejected ... pursuant to this section," Section 10.9 states, "shall be assumed by [Alma] and assigned to [Noble]."[50] The Exchange Agreement was not specifically referenced in the Plan and was never rejected in any way permitted by the Plan and thus was assumed by Alma and assigned to Noble. Paragraph 15 of the bankruptcy court's Order clearly stated: "those Executory Contracts ... proposed to be assumed and assigned to [Noble] pursuant to the Plan are ordered assumed and assigned to [Noble]".[51]

The APA did not require Noble to close unless "[t]he Plan materially conforms to the terms and conditions of this Agreement".[52] The fact that Noble elected to close indicates that in its view, at least, the assignment of executory contracts under the Plan materially conformed to the APA. And Noble's post-bankruptcy conduct was consistent with that view.

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[49] Plan § 10.8.

[50] Plan § 10.9.

[51] Order ¶ 15.

[52] APA § 6.01(g).

Noble removed an unused facility as required by the Exchange Agreement, and even indemnified Conoco from liability on two other contamination claims.[53]

Noble argues that the Exchange Agreement could not be assumed and assigned under the general, catchall assumed-unless-rejected provisions of Sections 10.8 and 10.9 of the Plan and Paragraph 15 of the Order, citing the Fifth Circuit's opinion in *In re O'Connor*.[54] O'Connor, the debtor in a Chapter 11 proceeding, was a party to a partnership agreement that the bankruptcy court held, and the district court assumed, was an executory contract.[55] The reorganization plan provided that certain executory contracts—not the partnership agreement—"are hereby rejected" while all others not previously rejected—which could have included the agreement—"will be assumed."[56] Neither the debtor's disclosures nor the plan made any specific reference to the agreement.[57] After the plan was confirmed, the estate trustee claimed to be entitled to exercise the debtor's rights under the partnership agreement.[58] The court of appeals held that the partnership agreement was not assumable under Section 365(c)(1) of the

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[53] The dissent misses the point, which is not that Noble's acceptance of responsibility under the Exchange Act created indemnity obligations that did not exist, but that Noble initially interpreted the APA, Plan, and Order as Conoco does.

[54] *Stumpf v. McGee (In re O'Connor)*, 258 F.3d 392, 401 (5th Cir. 2001).

[55] *Id.* at 396, 400.

[56] *Id.* at 395, 401.

[57] *Id.* at 401.

[58] *Id.* at 396.

Bankruptcy Code and Louisiana law, and therefore the agreement passed through the bankruptcy unaffected to the pre-bankruptcy debtor rather than to the reorganized debtor, a liquidating trust.[59] The bankruptcy court had not addressed that issue but had concluded that the partnership agreement had neither been assumed nor rejected because "will be assumed", especially in contrast with "are hereby rejected", indicated that something more than plan confirmation was required for assumption.[60] The court of appeals deferred to the bankruptcy court's interpretations of the plan, noting that it was "consistent with the conclusions by other courts that an executory contract may *not* be assumed either by implication or through the use of boilerplate plan language."[61]

Thus, the actual holdings in *O'Connor* were that the partnership agreement was not an assumable executory contract and that the bankruptcy court's interpretation of the plan's literal language was entitled to deference. The Fifth Circuit's labeling of the language at issue as "boilerplate" was no more than an aside. The court in *In re Greater Southeast Community Hospital Corp. I* characterized it as "dicta upon an alternative ground" for the court's decision.[62] The Chapter 11 plan in *Greater Southeast* provided that executory contracts not identified within a

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[59] *Id.* at 401-402.

[60] *Id.* at 401.

[61] *Id.*

[62] *Alberts v. Humana Health Plan, Inc. (In re Greater Southeast Cmty. Hosp. Corp. I)*, 327 B.R. 26, 34 (Bankr. D.D.C. 2005).

specified time "will be deemed assumed", subject to provisions relating to cure.[63] Distinguishing *O'Connor*, the court gave effect to the provision:

> The plan here expressly assumed the executory contracts at issue, and did not assume them by implication. Moreover, [there is no contention] that the plan used ineffectual boilerplate language. By explicitly deeming the executory contracts at issue assumed (subject to a retained right of rejection if cure amounts proved unacceptable) and setting forth provisions for fixing the cure amounts, and deadlines for paying the same, the confirmed plan here can hardly be said to have employed "boilerplate language" (whatever that term means).[64]

Greater Southeast also distinguished *In re Parkwood Realty Corp.*[65] There, after the debtor in a Chapter 11 proceeding had rejected several executory contracts, the plan provided that "[a]ll other executory contracts ... which have not been previously rejected shall be deemed rejected on [the plan's effective date]."[66] The debtor did not disclose or mention a shareholders agreement to which it was a party, or give its co-party, Parkside Lakes, notice of the bankruptcy proceeding.[67] Repeatedly referring to the plan language as boilerplate, the bankruptcy court

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[63] *Id.* at 29 n.3.

[64] *Id.* at 35.

[65] 157 B.R. 687 (Bankr. W.D. Wash. 1993).

[66] *Id.* at 689.

[67] *Id.* at 689, 691.

refused to allow the debtor to avoid its obligations under the agreement for two reasons.[68] First: "rejection [of an executory contract] is specifically subject to § 365 and as such requires 'actual consideration by the Court.' ... [T]o approve the rejection of an unidentified contract results in purely fictitious compliance with the Code."[69]

> Second, and perhaps more important, are the due process implications inherent in the debtor's position. Parkside Lakes has never had notice that the debtor viewed the Shareholders Agreement as an executory contract, much less that it was one of those being rejected. Further, Parkside Lakes did not have notice of the hearing on confirmation. Indeed the executory contract argument was only raised defensively, after confirmation, when it was too late to file a claim for damages. This is insufficient.[70]

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[68] *Id.* at 690-691.

[69] *Id.* at 691 (internal citation omitted). The dissent argues that the court in Alma's bankruptcy proceeding could not have given actual consideration to approval of Alma's assumption and assignment of the Exchange Agreement when it did not know the agreement existed. *Post* at ___. But Section 365 does not impose an obligation on the court to conduct an independent investigation. Conoco was a party to the proceeding and raised no objection. And Noble had at least constructive notice of the Executive Agreement in its chain of title and raised no objection. There is nothing before us to indicate that Alma's assumption and assignment to Noble were of any interest to creditors or others. The bankruptcy court's approval of the plan was perfectly understandable.

[70] *Id.*

According to the court in *Greater Southeast*, "*Parkwood Realty* turned on due process concerns, and only secondarily questioned the effectiveness of a plan provision deeming executory contracts rejected."[71] Those concerns were for the debtor's co-party who, unlike Noble, had no notice of the proceedings; Noble, in contrast, was thoroughly involved in Alma's bankruptcy.

Two cases help summarize the law on assumption-rejection catchall provisions in Chapter 11 plans. The plan in *In re Amerivision Communications, Inc.* provided that "the Debtor shall be deemed to have rejected each Executory Contract to which it is a party, unless such contract ... was previously assumed by the Debtor" or other specified conditions were met, and "[t]he Confirmation Order will provide for the rejection of those Executory

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[71] *Greater Southeast*, 327 B.R. at 35. Thus, neither *O'Connor* nor *Parkwood* supports the dissent's broad assertion that "bankruptcy courts have consistently concluded that the assumption or rejection of an executory contract under section 365 cannot be approved in bankruptcy if the contract has not been disclosed." *Post* at ___. The only other case it cites in support is *In re Golden Triangle Film Labs, Inc.*, 176 B.R. 608, 610 (Bankr. M.D. Fla. 1994). There, as the dissent notes, the plan provided that "all executory contracts and unexpired leases of the Debtor shall be assumed ... and ... assigned to [the] reorganized [debtor] ... except any executory contracts and unexpired leases that are subject of separate motions to reject file[d] pursuant to [Section] 365". *Id.* at 609. The court held that because no motion to reject the nonresidential lease at issue had been filed, and the plan and Section 365(d)(4) both required such a motion, the lease had not been rejected. *Id. Golden Triangle* is contrary to the dissent's view that the plain language of a bankruptcy plan and order, though general, cannot control.

Contracts not assumed or assigned previously or as provided herein."[72] The debtor listed a production contract as one of its executory contracts, and the co-party, Dataprose, knew of the bankruptcy proceeding, but the production contract was not listed as one to be rejected.[73] After the plan was confirmed, Dataprose objected to the rejection of the production contract.[74] The court upheld the language of the plan and confirmation order:

> In the case of *In re Victory Markets, Inc.*, 221 B.R. 298 (2d Cir. BAP 1998), the Chapter 11 reorganization plan contained a provision that explicitly rejected all executory contracts not listed on an assumption schedule attached to the plan. A majority of the court ruled that the absence of an executory contract from the schedule effected a rejection of the contract at issue because the plan language was clear and the contract was not explicitly assumed. *Id.* at 304-05.
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> We agree with the Court of Appeals for the Fifth Circuit that specific notice of the plan proponent's intent is required through the confirmation process or by separate motion. [*In re Nat'l Gypsum Co.*, 208 F.3d 498, 513 (5th Cir. 2000).] However, the question in this case is not only whether the

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[72] *Dataprose, Inc. v. Amerivision Commc'ns, Inc. (In re Amerivision Commc'ns, Inc.)*, 349 B.R. 718, 721 (B.A.P. 10th Cir. 2006).

[73] *Id.*

[74] *Id.* at 721-722.

> use of boilerplate language is acceptable (assuming this is boilerplate language), but also whether the notice under the circumstances was adequate.
>
> Under the facts of this case, the Court concludes that the plan language provided adequate notice of the intended rejection. The Court does not invalidate boilerplate language per se. The validity of any language depends upon notice and clarity and the overall information provided to the parties in interest. Here, the plan provision put any party to an executory contract on notice that absent specific assumption, the contract was rejected.[75]

The second case, *Tenucp Property, LLC v. Riley (In re GCP CT School Acquisition, LLC)*,[76] involved a Chapter 11 debtor tenant's rejection of a lease. The court upheld the rejection:

> Another issue that has surfaced in case law is when a party uses so-called boilerplate language to assume or reject. Some courts have held that "boilerplate" language in a chapter 11 plan may provide adequate notice of the proposed rejection of an executory contract. *See, e.g., Dataprose, Inc. v. Amerivision Commc'ns, Inc. (In re Amerivision Commc'ns, Inc.),* 349 B.R. 718 (10th Cir. BAP 2006)....

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[75] *Id.* at 723.

[76] 429 B.R. 817 (B.A.P. 1st Cir. 2010).

> The U.S. Bankruptcy Appellate Panel of the Second Circuit reached a similar conclusion in *Charter Asset Corp. v. Victory Mkts., Inc. (In re Victory Mkts., Inc.),* 221 B.R. 298 (2d Cir. BAP 1998)....
>
> Other courts, however, have concluded that general boilerplate language does not automatically effect assumption or rejection, holding that the assumption or rejection will only be effective if the bankruptcy court actually considers the provision at issue.[77] ...
>
> Ultimately, the issue is one of notice. As the *Amerivision* panel noted, the question is not only whether the language contained within the plan or motion is sufficiently explicit, but whether the notice (service of the relevant documents) under the circumstances was adequate. Thus, "the validity of any language depends upon notice and clarity and the overall information provided to the parties in interest."[78]

We would be reluctant to disregard any language in a court order as "boilerplate", but that label certainly does not fit here. The Order confirmed the

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[77] *Id.* at 827-828 & n.14 (citing *In re Cole*, 189 B.R. 40, 46 (Bankr. S.D.N.Y. 1995) (refusing to give effect to boilerplate assumption provision in plan); *Stumpf v. McGee (In re O'Connor)*, 258 F.3d 392, 401 (5th Cir. 2001); *In re Parkwood Realty Corp.*, 157 B.R. 687, 690-691 (Bankr. W.D. Wash. 1993); *Cont'l Country Club, Inc. v. Burr (In re Cont'l Country Club, Inc.)*, 114 B.R. 763, 766-767 (Bankr. M.D. Fla. 1990)).

[78] 429 B.R. at 827-829 (quoting *Amerivision*, 349 B.R. at 723).

APA and the Plan that used both exclusive and non-exclusive language throughout, and we must assume the choices were intentional. As Conoco observes, the Plan could have stated, as reorganization plans often do, that all executory contracts not formally assumed and assigned by a certain date would be rejected. Either way, the language is adjudicatory, not boilerplate.[79]

Noble complains that the Exchange Agreement was not listed in Alma's disclosures or mentioned in any way in the bankruptcy proceeding and asserts that it was unaware of the agreement before closing on the APA.[80] We have noted that the Exchange Agreement was specifically referenced in Conoco's assignment to Alma of some of the interests Noble acquired, and that the assignment was expressly subject to the Exchange Agreement. Thus, Noble had at least constructive notice of the Exchange Agreement. Noble also complains that Conoco was a party to the bankruptcy proceeding and could have

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[79] *See*, *e.g.*, *Amerivision*, 349 B.R. at 721; *Charter Asset Corp. v. Victory Mkts., Inc. (In re Victory Mkts., Inc.)*, 221 B.R. 298, 303 (B.A.P. 2d Cir. 1998) (holding that plain language, "unexpired leases ... not previously assumed and assigned are hereby specifically rejected", should be given effect).

[80] The dissent cites three cases "that have addressed a bankruptcy debtor's failure to follow the specific requirements of section 365 when attempting to dispose of an executory contract": *American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 78 (3d Cir. 1999); *In re Allegheny Health, Education and Research Foundation*, 383 F.3d 169, 172 (3d Cir. 2004); and *Gray v. Western Environmental Services & Testing, Inc. (In re Dehon, Inc.)*, 352 B.R. 546, 558 (Bankr. D. Mass. 2006). *Post* at ___-___. In all three, the court gave effect to the debtor's intent. Thus, the dissent's reliance on these cases is perplexing.

disclosed the Exchange Agreement but never did. Noble argues that full disclosure in bankruptcy proceedings is essential, and that if a buyer of a debtor's assets risks being saddled with undisclosed liabilities, asset sales, important in estate reorganizations, will be less attractive. While we take Noble's point, the issue before us is not whether the bankruptcy proceedings were conducted as they should have been. We decide what the APA, the Plan, and the Order mean, and whether they are effective under Section 365. As critical as disclosure in bankruptcy proceedings may be, we think it 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.

The dissent argues that today's decision is "manifestly inequitable."[81] We disagree. Noble knew from the plain terms of the APA, the Plan, and the Order that it could be assigned executory contracts not specifically listed. It had at least constructive knowledge of the Exchange Agreement in its own chain of title. Years after the bankruptcy proceeding was over, it repeatedly honored the indemnity obligation imposed by the agreement. And had Noble needed indemnification from Conoco, no doubt it would have sought the benefits promised it by the Exchange Agreement.[82] But inequitable or not, we

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[81] *Post* at ___.

[82] After Alma's bankruptcy, Noble's predecessor sold the assets obtained under the Exchange Agreement.

think the result we reach is compelled by the governing documents and the law.

We thus conclude that by the APA, the Plan, and the Order, the Exchange Agreement was assumed by Alma and assigned to Noble.

* * * * *

The judgment of the court of appeals is, accordingly,

Affirmed.

Nathan L. Hecht
Chief Justice

Opinion delivered: June 23, 2017

JUSTICE JOHNSON, joined by JUSTICE GREEN and JUSTICE GUZMAN, dissenting.

I disagree with the Court for essentially two reasons. First, the Court says that "the issue before us is not whether the bankruptcy proceedings were conducted as they should have been." *Ante* at ___. But that is precisely the issue. Alma was not authorized to assign the Exchange Agreement, which I agree was an executory contract, unless it was done pursuant to and in conformance with Bankruptcy Code section 365. 11 U.S.C. § 365.[1] Even Conoco agrees:

> Alma could not have assigned *any* executory contract—the Exchange Agreement or anything else—in its bankruptcy to [Noble] under Texas law; it could only accomplish

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[1] *Otto Preminger Films, Ltd. v. Qintex Entm't, Inc. (In re Qintex Entm't)*, 950 F.2d 1492, 1495 (9th Cir. 1991) (holding that the sale of the debtor's assets did not include any executory contract unless the debtor first assumed that contract under section 365); *Chira v. Saal (In re Chira)*, 367 B.R. 888, 900 (S.D. Fla. 2007) (recognizing that section 365 is the exclusive remedy for the sale of executory contracts); *Tech Pharmacy Servs., Inc. v. RPD Holdings, LLC (In re Provider Meds, LLC)*, No. 13-30678, 2017 WL 213814, at *16 (Bankr. N.D. Tex. Jan. 18, 2017) (noting that section 365 is the exclusive means of effectuating assumption and assignment of executory contracts in bankruptcy); *Compton v. Mustang Eng'g Ltd. (In re MPF Holding U.S., LLC)*, 495 B.R. 303, 321 (Bankr. S.D. Tex. 2013) (recognizing that in the context of executory contracts, section 365 is the exclusive remedy available to parties wishing to sell property); *In re Taylor*, 198 B.R.142, 167 (Bankr. D.S.C. 1996) (providing that section 365 is either an exclusive remedy or a necessary intermediate step before a sale of assets under section 363 is available); *In re Robinson Truck Line, Inc.*, 47 B.R. 631, 638 (Bankr. N.D. Miss. 1985) (holding that within the context of executory contracts under a Chapter 11 plan, section 365 is the exclusive remedy available to debtors).

> such assignment under [Bankruptcy Code] Section 365. "[S]ection 365 is the exclusive means of effectuating assumption and assignment of executory contracts in bankruptcy." *Compton v. Mustang Eng'g Ltd.* (*In re MPF Holding U.S. LLC*), 495 B.R. 303, 319 (Bankr. S.D. Tex. 2013); *see In re Qintex Entm't, Inc.*, 950 F.2d 1492, 1495-96 (9th Cir. 1991); *In re Taylor*, 198 B.R. 142, 167 (Bankr. D. S.C. 1996); *In re Robinson Truck Line, Inc.*, 47 B.R. 631, 638 (Bankr. N.D. Miss. 1985); *In re LHD Realty Corp.*, 20 B.R. 717, 719 (Bankr. S.D. Ind. 1982) (all holding that, within the Bankruptcy Code, Section 365 exclusively governs the assumption and assignment of executory contracts in bankruptcy proceedings).

Conoco Resp. Brief at 13 (citing 11 U.S.C. § 365). The Court says Alma did so, but it did not.

Second, the Exchange Agreement was not disclosed in the bankruptcy proceeding by Alma, either in its schedules or otherwise. The Court avoids that difficulty by saying Noble had constructive knowledge of the Agreement and Alma assumed it because of general language in the Asset Purchase Agreement (APA), the Bankruptcy Plan, and the bankruptcy court's Order:

> Section 10.8 of the Plan provides that executory contracts not specifically referenced were to be "assumed and assigned to [Noble]" unless rejected at closing.... "All ... executory contracts ... not ... rejected ... pursuant to this section," Section 10.9 states,

> shall be assumed by [Alma] and assigned to [Noble]. The Exchange Agreement was not specifically referenced in the Plan and was never rejected in any way permitted by the Plan and thus was assumed by Alma and assigned to Noble. Paragraph 15 of the bankruptcy court's Order clearly stated: "those Executory Contracts ... proposed to be assumed and assigned to [Noble] pursuant to the Plan are ordered assumed and assigned to [Noble].... The fact that Noble elected to close indicates that in its view, at least, the assignment of executory contracts under the Plan materially conformed to the APA.

Ante at ___ (alterations in original) (citations omitted). Again, the Court is mistaken.

The Court recognizes what is well established in bankruptcy law: section 365 does not authorize a debtor to assign an executory contract unless it first assumes the agreement and the assignee gives adequate assurance of performance. *See* 11 U.S.C. § 365 (f)(2). Under relevant bankruptcy authority construing section 365, general plan language such as that the Court references does not effect assumption of an undisclosed executory contract, approval of a putative assignee's adequate assurance of performance of it, and then its assignment.

The Court also points out that Noble acted as though it had assumed the Exchange Agreement by indemnifying Conoco in connection with previous post-bankruptcy claims. But past conduct "does not create a contract right that does not otherwise exist." *Sun Oil Co. (Del.) v. Madeley*, 626 S.W.2d 726, 734 (Tex. 1981).

And regardless of the circumstances surrounding any such actions by Noble and how it initially interpreted the bankruptcy documents, the actions do not alter whether Alma complied with the requirements of section 365 by expressly assuming the executory Exchange Agreement, Noble's providing adequate assurance of its performance, Alma's expressly assigning it, and the bankruptcy court's approval of all three.

Further, without citing authority except Conoco's argument, the Court says that the Plan language could have gone the other way and solved Noble's problems. That is, the Plan could have said "as reorganization plans often do, that all executory contracts not formally assumed and assigned by a certain date would be rejected." *Ante* at ___. It may be true that Alma's Plan could have contained such language, but that is not the question. The question is what actually happened here and how it plays out under section 365.

Under section 365, a trustee or debtor-in-possession "may assume or reject any executory contract." 11 U.S.C. § 365(a); *Gray v. W. Envtl. Servs. & Testing, Inc. (In re Dehon, Inc.)*, 352 B.R. 546, 558 (Bankr. D. Mass. 2006). "By permitting debtors to shed disadvantageous contracts but keep beneficial ones, § 365 advances one of the core purposes of the Bankruptcy Code: 'to give worthy debtors a fresh start.'" *Eagle Ins. Co. v. BankVest Capital Corp. (In re BankVest Capital Corp.)*, 360 F.3d 291, 296 (1st Cir. 2004) (quoting *Gannett v. Carp (In re Carp)*, 340 F.3d 15, 25 (1st Cir. 2003)). The decision to reject or assume an executory contract is "subject to the court's approval,"

11 U.S.C. § 365(a), thus protecting the integrity of the proceedings and the best interests of all the concerned parties.

Only after a debtor has assumed an executory contract can the debtor assign it. 11 U.S.C. § 365(f)(2); *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 253 (5th Cir. 2006) ("According to § 365(f)(2)(A), assumption must precede assignment."); *In re Adelphia Commc'ns Corp.*, 359 B.R. 65, 71 (Bankr. S.D.N.Y. 2007) ("In order to assign an executory contract, a debtor in possession or trustee must assume it."). Bankruptcy courts have recognized that the Code does not preclude a debtor from neither assuming nor rejecting an executory contract. *In re Mirant Corp.*, 440 F.3d at 253 n.19. If an executory contract is neither assumed nor rejected, it remains in effect and passes with other property, that is, it "rides through" to the reorganized debtor. *Id.* Because such a contract is unaffected by the bankruptcy, the non-debtor party to the contract may seek redress outside of the bankruptcy context for any default by the debtor. *In re Dehon*, 352 B.R. at 561. Simply put, if the debtor wants to be relieved of the obligations of an executory contract, the contract must be disclosed and dealt with according to bankruptcy law and rules.

Conoco asserts, and the Court agrees that, pursuant to section 365, Alma assumed the entire Exchange Agreement and wholly assigned it to Noble. Noble advances two arguments in opposition. First, Alma did not disclose the Exchange Agreement during the bankruptcy proceedings as it was required to do by bankruptcy law. Second, an executory contract must

be explicitly assumed in bankruptcy, and Alma did not explicitly assume the Exchange Agreement.

Regarding Alma's failure to disclose the Exchange Agreement during the bankruptcy proceedings, the Court concludes that "[a]s critical as disclosure in bankruptcy proceedings may be, we think it 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." *Ante* at ___. Of course the Court is correct that parties to bankruptcy proceedings must have confidence in proceedings, plans, and court orders. But that confidence only comes if the proceedings are transparent and bankruptcy law and requirements are strictly complied with. Otherwise, the proceedings become a matter of gamesmanship—how opaque can a debtor's filings and disclosures be and how many omissions can be made without consequences to the debtor seeking relief and other parties such as Conoco with knowledge of the opaqueness and who ostensibly are benefitted? In any event, the Court's statement is counter to the position of federal courts regarding full and complete disclosure, as is discussed below. *See, e.g.*, *Zurich Am. Ins. v. Tessler (In re J.A. Jones, Inc.)*, 492 F.3d 242, 249, 252 (4th Cir. 2007) (holding that even though a Chapter 11 Plan of Liquidation had been confirmed, a creditor was not bound by the terms of the settlement because the debtor had not included the creditor on the schedule of creditors as required by 11 U.S.C. § 521).

Not only is the Court's decision counter to bankruptcy authority, it is manifestly inequitable.

The Court's decision prejudices Noble, who was not notified by Alma of the indemnity obligation in the Exchange Agreement. And the Court's decision benefits the direct parties to the Exchange Agreement—Conoco and Alma—who negotiated, entered into, and accepted its risks in a presumably arms-length, fully-vetted business transaction, then allowed it to ride through the bankruptcy proceedings without notice to the trustee, the bankruptcy court, or the entities considering purchasing Alma's assets. Conoco benefits by having a claim against Noble instead of the reorganized Alma, and the reorganized Alma benefits by escaping liability for bankrupt Alma's failure to comply with bankruptcy law by not disclosing an executory contract. The Court says that "Noble knew from the plain terms of the APA, the Plan, and the Order that it could be assigned executory contracts not specifically listed." *Ante* at ___. But as discussed below, Noble explicitly limited its assumption of Alma's liabilities in the APA and Noble should have been able to rely on Alma's bankruptcy schedules without the need to conduct its own investigation into whether those schedules were accurate. *See Popgrip, LLC v. Brown's Chicken & Pasta, Inc. (In re Brown's Chicken & Pasta, Inc.)*, 503 B.R. 86, 94 (Bankr. N.D. Ill. 2013); *see also Cadle Co. v. Pratt (In re Pratt)*, 411 F.3d 561, 566 (5th Cir. 2005).

As for Alma's failure to disclose the Exchange Agreement, a debtor is required to disclose assets, liabilities, and executory contracts on particularized schedules. 11 U.S.C. § 521(a)(1)(i); FED. R. BANKR. P. 1007(b)(1)(C); *see* Official Bankruptcy Form 6, Schedule G ("Describe *all* executory contracts of *any* nature and all unexpired leases of real or personal

property [and] [s]tate nature of debtor's interest in contract, i.e., 'Purchaser,' 'Agent,' etc." (emphasis added)). Alma did not disclose the Exchange Agreement as an executory contract. And bankruptcy courts have firmly put both the obligation of full disclosure and the risks of non-disclosure on the debtor. *See Diamond Z Trailer v. JZ L.L.C. (In re JZ L.L.C.)*, 371 B.R. 412, 417 (B.A.P. 9th Cir. 2007) ("It is settled that the debtor has a duty to prepare these bankruptcy schedules and statements 'carefully, completely, and accurately' and bears the risk of nondisclosure." (quoting *Cusano v. Klein*, 264 F.3d 936, 946-49 (9th Cir. 2001))); *Burnes v. Pemco Aeroplex*, 291 F.3d 1282, 1286 (11th Cir. 2002) ("Bankruptcy courts also rely on the accuracy of the disclosure statements when considering whether to approve a no asset discharge. Accordingly, 'the importance of full and honest disclosure cannot be overstated.'" (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996))); *In re Colvin*, 288 B.R. 477, 481 (Bankr. E.D. Mich. 2003) (collecting cases and concluding that disclosure obligations of debtors "are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge").

The Court seems to conclude that Alma's failure to disclose the Exchange Agreement as required by the Bankruptcy Code was excused because Noble had "constructive knowledge" of the agreement. *Ante* at ___. But "constructive knowledge" is not applicable in the bankruptcy context. Debtors are statutorily required to explicitly disclose assets, liabilities, and executory contracts so all the parties involved,

including the bankruptcy court, can rely on the disclosures. *See Burnes*, 291 F.3d at 1286 (noting that creditors and bankruptcy courts rely on the accuracy of disclosure statements). "Schedules serve the important purpose of insuring that adequate information is available for the Trustee and creditors *without need for investigation* to determine whether the information provided is true." *In re Pratt*, 411 F.3d at 566 (emphasis added) (internal quotations omitted); *see also Paradigm Air Carriers, Inc. v. Tex. Rangers Baseball Partners (In re Tex. Rangers Baseball Partners)*, 498 B.R. 679, 704 (Bankr. N.D. Tex. 2013) ("Under the Bankruptcy Rules, notice must be given in a bankruptcy case to counter-parties to the contract *and to other parties in interest* of a debtor-in-possession's contemplated decision to either reject or assume an executory contract." (emphasis added)). Further, "[p]arties who purchase assets from bankruptcy estates should be able to rely on debtors' Schedules and Statements of Financial Affairs. Otherwise, competent, financially able purchasers will shun a bankruptcy process that requires them to speculate about what they are asked to purchase." *In re Brown's Chicken & Pasta*, 503 B.R. at 94 (determining that information in a letter and monthly operating report was not sufficient to put an asset purchaser on notice of the existence of a franchise agreement that was not included in the bankruptcy schedules).

Further, in concluding that Noble had constructive knowledge of the Exchange Agreement, the Court cites cases and statutes regarding notice based on recorded instruments. *Ante* at ___ n.10. But none of these are applicable in a bankruptcy

proceeding where the requirements for assigning an executory contract are explicitly spelled out in the Bankruptcy Code. And finally, none of these address whether the purchaser of an oil and gas lease was put on notice of a *liability* not addressed in the purchase contract. *See Cooksey v. Sinder*, 682 S.W.2d 252, 253 (Tex. 1984) ("Because Cooksey's deed was properly recorded and within the chain of title of the Sinder parents and Tierra Buena, they had legal notice of the lien and thus took the property subject to that lien. This defeats their innocent purchaser defense."); *cf. Regency Advantage Ltd. P'ship v. Bingo Idea-Watauga, Inc.*, 936 S.W.2d 275, 278 (Tex. 1996) (holding that the assignee of a lease was not liable on a commission agreement in the lease because to be liable "it must have expressly assumed such liability").

Alma did not disclose the Exchange Agreement, and in the bankruptcy context, the risk of a bankruptcy debtor's failure to disclose falls on the debtor. *See, e.g.*, *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 785 (9th Cir. 2001) (holding that a debtor was judicially estopped from asserting a claim that had not been disclosed in bankruptcy because "the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets.... The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete." (quoting *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 208 (5th Cir. 1999))); *In re JZ L.L.C.*,

371 B.R. at 417 ("It is settled that the debtor ... bears the risk of nondisclosure."); *Sanderson v. Ptasinski (In re Ptasinski)*, 290 B.R. 16, 26 (Bankr. W.D.N.Y. 2003) (denying debtors' discharge based on their failure to disclose assets and noting that "the benefits received by an honest debtor in a bankruptcy case, including a discharge of all dischargeable debts, a 'fresh start,' are extraordinarily disproportionate to the few demands and expectations [of full disclosure] placed upon a debtor by the Bankruptcy Code and Rules"). Otherwise, a debtor would be incentivized to conceal information. *Superior Crewboats Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 336 (5th Cir. 2004) ("The Hudspeaths had the requisite motivation to conceal the claim as they would certainly reap a windfall had they been able to recover on the undisclosed claim without having disclosed it to the creditors. Such a result would permit debtors to '[c]onceal their claims; get rid of [their] creditors on the cheap, and start over with a bundle of rights.'" (alterations in original) (quoting *Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993))); *Burnes*, 291 F.3d at 1288 ("Allowing [the debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them.").

Alma's failure to disclose the Exchange Agreement factors into the ultimate question of whether Alma assumed and assigned it in accordance with section 365's requirements. Under section 365, an executory contract may be assigned only after (1) it

has been assumed by the debtor, (2) the assignee has provided adequate assurance of future performance, and (3) the bankruptcy court has approved. 11 U.S.C. § 365(a), (f)(2). Noble argues that Alma did not explicitly assume the Exchange Agreement and an executory contract must be explicitly assumed in bankruptcy—it cannot be assumed by implication. *See Stumpf v. McGee (In re O'Connor)*, 258 F.3d 392, 401 (5th Cir. 2001) (stating that an executory contract may not be assumed by implication). This requirement of explicit assumption is closely tied to the requirement of court approval.

> Congress enacted section 365(a) as part of the Bankruptcy Code of 1978, making court approval of [executory contract rejection or assumption] obligatory for the first time.... The predecessor to section 365(a) ... did not explicitly require judicial approval [of assumption or rejection decisions] .... In adopting a requirement of court approval, Congress overruled precedent that allowed trustees to show by informal conduct that they had either assumed or rejected [executory contracts].

In re Dehon, 352 B.R. at 560 (alterations in original) (quoting *Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1026 (1st Cir. 1995)).

As noted above, the Court concludes that the Exchange Agreement was assumed in the bankruptcy proceeding based on bankruptcy plan language providing that "executory contracts not specifically referenced were to be 'assumed and assigned to

[Noble]' unless rejected at closing." *Ante* at ___ (alteration in original) (citing Plan § 10.8). But the Court does not explain how the bankruptcy court could have approved the assumption as required by section 365 when the contract's existence was known only to Alma and Conoco and undisclosed by either of them in the bankruptcy to other parties, the trustee, or the court. Rather, the Court says that the bankruptcy court's approval of the plan was "perfectly understandable" even though it did not know the agreement existed because "Section 365 does not impose an obligation on the court to conduct an independent investigation." *Ante* at ___ n.68. I completely agree that section 365 does not require a court to conduct an independent investigation. But that point, again, goes back to Alma's responsibility to disclose the agreement because bankruptcy courts rely on disclosure statements. *See Burnes*, 291 F.3d at 1286 ("Bankruptcy courts also rely on the accuracy of the disclosure statements ....").

Nor does the Court explain how the bankruptcy court could have intended its order specifying that Noble has "provided adequate assurance of future performance of all Executory Contracts and unexpired leases being assigned to it" to include the undisclosed Agreement when neither the court nor Noble knew of the contract. Order § 15. That is because there is no reasonable, legally sound explanation for it. Rather, as was noted by the court in *In re Parkwood Realty Corp.*, a bankruptcy court interpreting general language approving assumption of an undisclosed executory contract and finding in its order that adequate assurance of future performance has been provided when the contract was not disclosed and was unknown

to the court, is pure fiction. 157 B.R. 687, 690-91 (Bankr. W.D. Wash. 1993).

Court approval of an executory contract's assumption has been described as "an indispensable step in the process" and an "explicit rule[] laid out by Congress." *In re A.H. Robins Co.*, 68 B.R. 705, 710 (Bankr. E.D. Va. 1986) ("Judicial approval of a motion to assume is critical, as issues of cure of default, adequate assurance of future performance and compensation for pecuniary loss sustained as a result of default are matters of law left solely to the court's resolve."). Assumption of an executory contract "elevates a prepetition liability to a postpetition liability, but also entitles the nondebtor party to first priority status. Court approval thus provides protection to the unsecured creditors whose claims could be prejudiced by potentially burdensome contracts—ones that may have driven the business into bankruptcy in the first place." *Mason v. Official Comm. of Unsecured Creditors (In re FBI Distribution Corp.)*, 330 F.3d 36, 45 (1st Cir. 2003).

As noted above, bankruptcy courts have consistently concluded that the assumption or rejection of an executory contract under section 365 cannot be approved in bankruptcy if the contract has not been disclosed. In *In re Parkwood Realty Corp.*, a bankruptcy plan provided that "[a]ll other executory contracts or unexpired leases of [the debtor] which have not been previously rejected shall be deemed rejected on the Effective Date." 157 B.R. at 689. The bankruptcy court concluded that an undisclosed executory contract was not rejected based on this language because section 365 requires "actual

consideration by the court," and under section 365's requirements, "to approve the rejection of an unidentified contract results in purely fictitious compliance with the Code." *Id.* at 689-91.

Similarly, in *In re Golden Triangle Film Labs, Inc.*, a confirmed plan stated "all executory contracts and unexpired leases of the Debtor shall be assumed by (and, to the extent necessary, assigned to) reorganized Golden Triangle Film Labs, Inc. ... except any executory contracts and unexpired leases that are subject of separate motions to reject." 176 B.R. 608, 609 (Bankr. M.D. Fla. 1994). The court determined that the unexpired lease at issue was not assumed under this language because section 365 requires approval from the court and "[t]his Court is unwilling to accept the proposition that the entry of an Order of Confirmation of a Plan which contains such unspecific reference to unexpired leases and executory contracts would be sufficient to comply with the requirements of § 365(a) of the Code." *Id.* at 610.

The Fifth Circuit also recognized that interpreting the phrase "[a]ll ... executory contracts, other than contracts with or for the benefit of employees, agent[s] or brokers, *not* rejected prior to time [sic] set forth herein *will be assumed*" as providing for the assumption of an undisclosed contract "would be inconsistent with § 365(a), which requires court approval." *In re O'Connor*, 258 F.3d at 401 (alterations in original). The Court discounts the Fifth Circuit's labeling of the plan language in that case as "boilerplate" as "no more than an aside," and not the court's actual holding. *Ante* at ___. But regardless of whether the plan language is labeled

"boilerplate," the ultimate issue is whether the proceedings complied with section 365's requirements, specifically that a bankruptcy court must approve both any assumptions and any rejections. And in bankruptcy proceedings, a general statement such as is contained in the bankruptcy court order here simply does not approve or disapprove of assumption of an undisclosed executory contract that the court has not expressly considered.

The Court references two cases in which plan language similar to the language in this case was upheld. *Ante* at ___ (quoting *Dataprose, Inc. v. Amerivision Commc'ns (In re Amerivision Commc'ns, Inc.)*, 349 B.R. 718 (B.A.P. 10th Cir. 2006); *Tenucp Prop. LLC v. Riley (In re GCP CT Sch. Acquisition, LLC)*, 429 B.R. 817 (1st Cir. 2010)). But in both of those cases, as the Court's quotes reflect, the focus was on whether the parties in interest had adequate notice of the assumption or rejection of the executory contract. *In re GCP CT Sch. Acquisition*, 429 B.R. at 828-29 ("[T]he question is not only whether the language contained within the plan or motion is sufficiently explicit, but whether the notice (service of the relevant documents) under the circumstances was adequate. Thus, the validity of any language depends upon notice and clarity and the overall information provided to the *parties in interest*." (emphasis added)); *In re Amerivision Commc'ns, Inc.*, 349 B.R. at 722 ("The Court does not invalidate boilerplate language per se. The validity of any language depends upon notice and clarity and the overall information provided to the *parties in interest*." (emphasis added)). Here, as the asset purchaser, Noble was clearly a party in interest. But it was provided *no* information

with regard to the Exchange Agreement. The validity of the Plan language as to the Executory Agreement depends upon the notice and information provided—or rather not provided—to Noble in the bankruptcy proceedings. Based on explicit section 365 requirements, I disagree that through the general Plan language Alma assumed the undisclosed Exchange Agreement, Noble gave adequate assurance of performance of it, and Alma assigned it to Noble.

Generally, if a debtor does not assume or reject an executory contract in bankruptcy, the contract "rides through" the bankruptcy and passes to the reorganized debtor, leaving the nondebtor's claim to survive the bankruptcy. *In re Mirant Corp.*, 440 F.3d at 253 n.19. The validity of Noble's purchase of Alma's interest in the Johnson Bayou Field during Alma's bankruptcy is not being challenged. To determine what that purchase means for the separate contractual indemnity obligation, there are three applicable bankruptcy cases that have addressed a debtor's failure to follow the specific requirements of section 365 when attempting to dispose of an executory contract.

In *American Flint Glass Workers Union v. Anchor Resolution Corp.*, the debtor, Anchor, assumed and then "purported" to assign an executory contract under section 365 to an asset purchaser. 197 F.3d 76, 78 (3d Cir. 1999). Under the language of the asset purchase agreement, however, the buyer was to assume only some of the debtor's obligations under that contract. *Id.* at 81. The court concluded that this was not a true executory contract assignment because the debtor did not assign it *cum onere*—"[h]aving

shifted fewer than all of the obligations (although it did assign all of the rights) created by the [executory contract], Anchor remains liable on those contractual obligations." *Id.* at 78, 81. In coming to this conclusion, the court looked at the underlying sales contract and noted that "here neither party to the sale transaction intended a true assignment of all rights and obligations.... [The contract the] Purchaser was willing to (and did) accept was simply *not* the same [contract] that Anchor had originally negotiated, and had then assumed." *Id.* at 81. The court concluded that because Anchor had not assigned the contract, the claims against it for priority payments by the nondebtor party to the executory contract were fully preserved. *Id.* at 83.

In another case, the Third Circuit Court of Appeals addressed an executory contract in which Tenet Health System purchased collective bargaining agreements from the bankruptcy debtor, Allegheny. *Tenet Healthsystem Phila., Inc. v. Nat'l Union of Hosp. & Health Care Emps. (In re Allegheny Health, Educ. & Research Found.)*, 383 F.3d 169, 172 (3d Cir. 2004). The agreements were listed on the schedule of "Assumed Contracts" that were to be assumed by Allegheny and assigned to Tenet. *Id.* However, the asset purchase agreement provided that Tenet only assumed obligations arising after the closing of the sale. *Id.* The nondebtor party to the collective bargaining agreement, the union, asserted that Tenet was refusing to abide by the terms of the collective bargaining agreements by failing to pay employees for sick leave that accrued before the bankruptcy sale. *Id.* at 173. The court concluded that under the asset purchase agreement Tenet was not liable for any

liabilities arising before the sale. *Id.* at 178. The court determined that while Allegheny might be liable on the collective bargaining agreements, *American Flint Glass* "does not provide authority for holding Tenet liable for the parts of the collective bargaining agreements that it declined to assume." *Id.* at 177. The court also pointed out that "[t]o the extent that Tenet has been able to enjoy the benefits of the collective bargaining agreements without having to pay for the sick leave that accrued under them, [the union] has itself to blame" because it failed to object to the asset purchase agreement containing the "division of responsibility between Tenet and Allegheny." *Id.*

The Court states that *In re Allegheny* is contrary to Noble's position because the non-debtors in that case had an existing right that was due at the time of bankruptcy, while in this case, indemnity was not due until a covered liability was established. *Ante* at ___. But the Court fails to explain away the discussion in *In re Allegheny* of the plan language which assigned the agreement to Tenet and the contrary asset purchase agreement language in which Tenet did not assume all obligations in the agreement.

Finally, in *In re Dehon*, the court addressed executory contracts that were listed as assets to be transferred, but not as executory contracts to be assumed and assigned. 352 B.R. at 562. The asset purchase agreement included all the debtor's "right, title, and interest in and to all agreements." *Id.* at 552. The purchaser of the assets and the non-debtor parties to the executory contracts continued to perform under the contracts after the bankruptcy. *Id.* at 553. When the bankruptcy plan administrator sought to recover

preferential payments made to the non-debtor parties, those parties argued that the contracts had been assumed by the debtor under section 365. *Id.* at 555. The court disagreed, noting that neither the debtor nor the plan administrator had requested assumption of the contracts, no assumption was approved by the court, and nothing indicated the debtor intended to assume the contracts. *Id.* at 564, 567. The court also concluded that because of the specific requirements in section 365, the sale order of the contracts did not operate as an assumption. *Id.* at 562. The court declined to decide whether the contracts "rode through" the bankruptcy, concluding that because the contracts had not been assumed, the non-debtor parties to them were subject to preference avoidance provisions. *Id.* at 566.

While none of these cases precisely fit the factual situation here, they are instructive for determining what happens in a situation such as this when the purchaser of an asset related to an executory contract has realized the benefits of the asset it purchased, but the related executory contract was not explicitly assumed and assigned by the debtor as required by section 365. In none of the cases did the courts try to manipulate the transactions in order to force the debtor and the executory contract into compliance with section 365. Rather, the courts looked at what actually occurred in the bankruptcy proceedings and what rights and liabilities the parties intended to transfer.

Looking at what the parties intended here, we begin with the APA. In Article I, Noble agreed to purchase assets, including oil and gas leases, as

described in Exhibit A. Section 1.04 is entitled "Assumed Liabilities" and provides that "[i]n consideration for the sale of the Assets, Buyer shall be responsible for the liabilities described in this Section." Neither the Exchange Agreement nor the indemnity obligation is included in that section as a liability. Section 1.06—"Liabilities"—provides that "[e]xcept for the Assumed Liabilities and Assumed Obligations (as such term is defined in Section 8.03 below), ... *Buyer is not assuming any liability of, or related to the Assets of any kind or description whatsoever*." (Emphasis added).

Article III is entitled "Representations and Warranties." It states that Alma represented and warranted to Noble: "Exhibit 'D' sets forth a list of the known contracts, agreements, plans, and commitments to which [Alma is] a party or ... bound," which meet the following criteria: "[a]ny guaranty, direct or indirect, by any affiliate of [Alma] of any contract, lease or agreement entered into by [Alma]," and "[a]ny agreement of surety, guarantee or indemnification by [Alma] or any of [its] affiliates outside of the ordinary course of business." The exchange Agreement was not listed on Exhibit D.

Article VIII contains obligations after closing. Section 8.03 sets out Noble's post-closing obligations including to assume "all duties and obligations as the owner of the Assets which accrue or arise from and after the Closing Date, including ... [to] perform obligations under any executory contracts or unexpired oil and gas leases *expressly assumed hereunder*." (emphasis added). Section 8.04 sets out Alma's post-closing obligations including "Except for

those matters expressly assumed by [Noble] ... [Alma] shall be responsible for and discharge all claims, costs, expenses and liabilities with respect to the Assets which accrue or relate to the times prior to" the effective date of closing.

Nothing in the APA indicates that Noble expressly assumed the Exchange Agreement or the indemnity obligation in it. Conoco points to the language in the confirmation order specifying that Alma was assuming and assigning to Noble all executory contracts not previously assumed or rejected. But as noted in the cases referenced above, when an executory contract is not assumed and assigned according to the section 365 requirements, as the Exchange Agreement was not, courts have looked to whether the parties intended for the debtor to assume the contract. And here, under the clear language of the APA, Noble intended to limit its assumption of any liabilities to obligations under executory contracts that were "expressly assumed" under the APA. Neither party argues that the Exchange Agreement was expressly assumed under the APA by Noble. To respond to what the Court says about the Plan language not rejecting all agreements not assumed when it could have done so, Noble did not want to assume any liabilities it did not know of—and said so in the APA.

Further, because Alma did not disclose the Exchange Agreement as required by bankruptcy law, as the debtor it bore the risk of nondisclosure. *See In re JZ L.L.C.*, 371 B.R. at 417. The risk of nondisclosure rightly should be that Alma, not the asset purchaser and its successors in interest, would remain liable for

the parts of the Exchange Agreement that Alma did not disclose and assign within the framework of the bankruptcy proceeding. *See In re Allegheny Health*, 383 F.3d at 177.

Conoco was a party to multiple other executory contracts with Alma that were listed as such in Alma's bankruptcy disclosure statement, along with a note about whether they were to be assumed or rejected and the identities of the parties to the contracts. So, Conoco was in a position to object to Alma's failure to include the Exchange Agreement in its disclosures and request that the bankruptcy court require Alma to either assume and assign the Agreement or reject it. Conoco did not do so. *See id.* (noting that the nondebtor party to an executory contract had itself to blame for not objecting to the asset purchase agreement). Under the circumstances, Conoco would not be deprived of its contractual indemnity right if the Court were to follow applicable bankruptcy precedent and hold that the Exchange Agreement rode through the bankruptcy and remained a liability of reorganized Alma. The right simply would not attach to Noble; it would attach to the reorganized party that succeeded to the interests of the party with whom Conoco made its deal in the beginning—Alma.

I would reverse the judgment of the court of appeals. Because the Court does not, I respectfully dissent.

Phil Johnson
Justice

OPINION DELIVERED: June 23, 2017

Appendix B

IN THE SUPREME COURT OF TEXAS

No. 15-0502

NOBLE ENERGY, INC.,

Petitioner,

v.

CONOCOPHILLIPS COMPANY,

Respondent.

On Petition for Review from the Court of Appeals for the Fourteenth District of Texas

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December 15, 2017

ORDERS ON CAUSES

* * *

THE MOTION FOR REHEARING OF THE FOLLOWING CAUSE IS DENIED:

NOBLE ENERGY, INC. v. CONOCOPHILLIPS COMPANY; from Harris County; 14th Court of Appeals District (14-13-00884-CV, 462 SW3d 255, 03-26-15)

(Justice Lehrmann not sitting)

* * *

Appendix C

THE STATE OF TEXAS
IN THE FOURTEENTH COURT OF APPEALS

No. 14-13-00884-CV

CONOCOPHILLIPS COMPANY,
Appellant,
v.
NOBLE ENERGY, INC.,
Appellee.

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2011-46437A

Reversed and Rendered in Part and Remanded in Part and Opinion filed March 26, 2017

OPINION

This case primarily concerns whether appellee Noble Energy, Inc.,[1] owes indemnification to appellant ConocoPhillips Company for underlying environmental claims based on a 1994 Exchange Agreement and Assignment and Bill of Sale involving the exchange of oil and gas assets in Louisiana. After

[1] Unless otherwise indicated, when we refer to "Noble," we are referring to the appellee corporation.

ConocoPhillips filed suit against Noble for declaratory judgment, and for breach of contract based on the failure to defend and indemnify and to perform other obligations, ConocoPhillips and Noble filed competing motions for summary judgment. The trial court permitted Noble to withdraw certain admissions and ultimately granted summary judgment in favor of Noble, finding as a matter of law that Noble was not a party to, did not assume and was not assigned, and otherwise had no obligation under the Exchange Agreement and assignment.

We conclude that the trial court did not abuse its discretion in permitting Noble to withdraw its admissions. However, we conclude that the Exchange Agreement constitutes an executory contract, assumed by the debtor/seller Alma Energy Corp. and assigned during chapter 11 bankruptcy proceedings and pursuant to a 2000 Asset Purchase and Sale Agreement to buyer East River Energy L.L.C./Elysium Energy, L.L.C. We also conclude that Elysium was a wholly owned subsidiary of Patina Oil & Gas Corporation and Noble Energy Production, Inc., as a wholly owned subsidiary of Noble Energy, Inc., merged with Patina. Therefore, the trial court erred in refusing to grant partial summary judgment in favor of ConocoPhillips and in granting summary judgment in favor of Noble. We reverse the trial court's final judgment, render judgment that Noble owes ConocoPhillips a duty of defense and indemnity, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

The underlying lawsuit concerns alleged environmental damage to the Johnson Bayou oil and

gas field in Cameron Parish, Louisiana, which has been operated as a unitized lease since approximately 1964. One of the operators of the Johnson Bayou field was General American, a predecessor to ConocoPhillips.

In 1994, Phillips Petroleum Company, another predecessor to ConocoPhillips, entered into an Exchange Agreement by which Phillips agreed to effect the transfer of certain Louisiana assets, including its interests in the Johnson Bayou field, to Alma and Texas Petroleum Investment Company (TPIC). In return, Alma and TPIC agreed to effect the transfer of certain other Louisiana assets to Phillips.

At closing, Phillips became the assignee of the Alma/TPIC leases and Alma/TPIC became the assignee of the Phillips leases, including Johnson Bayou. Under part VII of the Exchange Agreement, each assignee agreed to indemnify each assignor for all claims arising out of waste materials or hazardous substances on the exchanged leases, whether or not attributable to the assignor's actions, "prior to, during or after the period of" the assignor's ownership. Each assignee also agreed to comply with laws and regulations relating to abandonment of wells or the leasehold property, and indemnify each assignor for related liabilities. Under part IX of the Exchange Agreement, each assignee agreed to indemnify each assignor for all claims, including clean-up or plugging liabilities for wells, "on account of any ... damage, destruction or loss of property, contamination of natural resources (including soil, air, surface water, or ground water) resulting from or arising out of ... or connected with the presence, disposal or release of any

material of any kind ... in, under, or on the Assets," at the time of the assignment or thereafter, and whether or not caused by the assignor. All indemnities were to survive closing and the transfer of the leases.

Additionally, in the Exchange Agreement, Alma/TPIC reserved and excepted from its assignment to Phillips "a production payment equal to a net 1.15% of 8/8ths in the Lake Washington," Louisiana, leases. The "production payment" was to run for 17 years from January 1, 1994. The parties then entered into an Assignment and Bill of Sale, made subject to the Exchange Agreement. This assignment included indemnity language virtually identical to that from the Exchange Agreement. For the next five years, Alma and its operating affiliate Equinox Oil Company, Inc., operated the Johnson Bayou field. Phillips issued production payments to Alma on its retained interest in the Lake Washington leases conveyed to Phillips.

On June 10, 1999, Alma and Equinox filed for chapter 11 bankruptcy. During the bankruptcy proceeding, by auction sale, Alma and Equinox sold their assets to East River pursuant to an Asset Purchase and Sale Agreement entered into May 3, 2000. The seller companies Alma and Equinox agreed to sell and the buyer East River agreed to purchase all of the seller companies' "rights and interests in and to all contracts, agreements, purchase orders, real property, real estate leases, and personal property leases in any way associated with" the seller companies' assets, including but not limited to material contracts listed on an exhibit. East River only agreed to assume the seller companies' liability for the

Assumed Liabilities and Assumed Obligations. East River's "Assumed Obligations" included "perform[ing] obligations under any executory contracts or unexpired oil and gas leases expressly assumed hereunder." These assumed obligations were to survive the closing.

The debtors' chapter 11 reorganization plan defines "Executory Contract" as "collectively, 'executory contracts' and 'unexpired leases' of the Debtors as of the Petition Date as such terms are used within section 365 of the Bankruptcy Code." The plan provides that all of the debtors' interests in any oil and gas leases "to the extent such leases are Executory Contracts, shall be assumed and assigned to" East River. The plan further provided that "any Executory Contract or lease not referenced above shall be assumed and assigned" to East River. The plan stated that agreements to be rejected by the debtors were listed in an exhibit to the disclosure statement. East River was to notify the debtors "of any leases or executory contracts" not listed in the exhibit that "East River elect[ed] not to have assumed and assigned to it by" the debtors. In addition, all leases or executory contracts not rejected or the subject of a motion to reject, listed on the exhibit, or on the list provided by East River to the debtors "shall be assumed by the Debtors and assigned to East River."[2]

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[2] This plan language is consistent with that contained in the disclosure statement. Also, the Asset Purchase and Sale Agreement expressly referenced the plan and stated that it "materially conforms to the terms and conditions of this Agreement." The Asset Purchase and Sale Agreement further

The bankruptcy court approved the plan by order in August 2000. The order provided that except for contracts and agreements already assumed or rejected, "those Executory Contracts and Unexpired Leases proposed to be assumed and assigned to East River ... pursuant to the Plan are ordered assumed and assigned to East River." The order stated that executory contracts and unexpired leases proposed to be rejected pursuant to the plan and the section 365 notices are ordered rejected. The order further stated that East River has "provided adequate assurance of future performance of all Executory Contracts and Unexpired Leases being assumed and assigned to it."

After the bankruptcy court entered its order, East River changed its name to Elysium.[3] Alma and Elysium then executed an Assignment, Bill of Sale and Conveyance to accomplish the transfer of interests in the oil and gas properties. This assignment incorporated the Asset Purchase and Sale Agreement and the order confirming the plan. The assignment further stated it was "made with full substitution and subrogation of [Elysium] in and to all indemnifications ... to the extent such substitution and subrogation may be made, otherwise, heretofore given or made with respect to the Interests."

In December 2003, Elysium entered into an Agreement of Purchase and Sale with Aspect Energy, LLC whereby Elysium sold its interest in the Johnson

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provided that it "shall specifically be approved by the Bankruptcy Court and shall be incorporated as part of the Plan."

[3] Throughout the remainder of this opinion, we will reference Elysium with the understanding that East River was the named buyer entity involved in the bankruptcy sale.

Bayou field to Aspect. Then Elysium and Azimuth Energy, LLC, a wholly owned subsidiary of Aspect, executed an Assignment and Bill of Sale to accomplish the transfer of interests.

In December 2004, Elysium's parent company Patina merged with Noble Energy Production. Under the merger, the surviving entity Noble Energy Production expressly assumed "all the obligations, duties, debts, and liabilities" of Patina.

In May 2010, the State of Louisiana and the Cameron Parish School Board filed suit in Cameron Parish district court, asserting several claims for environmental damage and contamination against ConocoPhillips and others, including Aspect and Azimuth, as current or former owners and operators of the Johnson Bayou field. ConocoPhillips made demands on both TPIC and Noble for defense and indemnity, but they each denied the demand.

In August 2011, ConocoPhillips filed suit against TPIC in Harris County district court, adding Noble as a defendant in May 2012. ConocoPhillips alleged that the defendants breached the defense and indemnity provisions in the Exchange Agreement and assignment, as well as provisions in the Exchange Agreement concerning environmental cleanup.[4] ConocoPhillips reached a settlement with the school board for $63 million, which the trial court approved.[5]

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[4] In January 2012, the trial court granted partial summary judgment in favor of ConocoPhillips and against TPIC, declaring that TPIC owed ConocoPhillips a duty to defend.

[5] The State of Louisiana dismissed its intervention in the underlying suit with prejudice.

During discovery, ConocoPhillips sent Noble requests for admission, which Noble initially answered as follows:

REQUEST FOR ADMISSION NO. 4:

> Admit that Alma transferred all of its rights and obligations stemming from the Assignment to Elysium in November 2000, as stated in paragraph 13 of Noble's Counterclaim filed in Great Northern Insurance Company and Federal Insurance Company v. Noble Energy Inc. and ConocoPhillips Company, Civil Action No. 3:11-cv-3467-F, Northern District of Texas, Dallas division, attached as Exhibit B.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

> Noble objects to "Elysium" because it is vague and ambiguous. Subject to this objection Noble admits that Alma transferred all of its rights and obligations stemming from the Assignment to Elysium Energy LLC.

REQUEST FOR ADMISSION NO. 5:

> Admit that Noble is the successor to Elysium by merger, as admitted in paragraph 11 of Noble's Answer and Counterclaim to GNIC and Federal's Complaint for Declaratory Judgment in the lawsuit, Great Northern Insurance Company and Federal Insurance Company v. Noble Energy Inc. and ConocoPhillips Company, Civil Action No. 3:11-cv-3467- F, Northern District of Texas, Dallas division, attached as Exhibit B.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

> Noble objects to "Elysium" because it is vague and ambiguous. Subject to this objection, Noble admits that it is the successor by merger to Elysium Energy, LLC.

In August and November 2012, ConocoPhillips moved for partial[6] traditional summary judgment, seeking declarations that Noble owed ConocoPhillips defense and indemnity under the Exchange Agreement. ConocoPhillips argued: the Exchange Agreement and assignment transferred ConocoPhillips' interests in the Johnson Bayou field to Alma; Alma later transferred its rights and obligations to Elysium; Noble merged with Elysium and is its successor; the underlying lawsuit includes claims of environmental damage to Johnson Bayou field; the Exchange Agreement provides that Noble owes a duty to defend ConocoPhillips from claims arising from such environmental damage; and ConocoPhillips was potentially liable to the plaintiffs in the underlying suit.

Noble responded and filed its own traditional motion for summary judgment, arguing: Elysium purchased assets and only certain liabilities during Alma's bankruptcy sale so there was no privity of contract; the bankruptcy court discharged all claims and liabilities against both Alma and Elysium; Noble has never owed an interest in or operated the property and Elysium sold its interest a year before Noble's

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[6] ConocoPhillips' request was partial because it did not address its claims for breach of contract or damages.

subsidiary merged with Elysium's parent; and the claims were filed a decade after the bankruptcy and several years after Elysium sold its interests.

ConocoPhillips responded, arguing: the Exchange Agreement was an executory contract assumed by Alma and assigned to Elysium during the bankruptcy proceeding; Noble admitted that Elysium assumed both the rights and obligations from the Exchange Agreement; Noble's bankruptcy arguments fail; Noble's actions demonstrate both an express and implied assumption of the Exchange Agreement obligations; under Texas law, a corporate merger does not extinguish pre-existing contractual duties; and Noble's discharge argument contradicts 20 years of the parties' performance under and substantial reliance on the Exchange Agreement.

Noble then moved for leave to withdraw and amend its admissions 4 and 5. According to Noble, ConocoPhillips misinterpreted Noble's admissions and all Noble admitted was that "the rights and obligations in the Cameron Leases (part of the assets sold as part of the bankruptcy sale) were transferred from Alma to Elysium," as opposed to any rights or obligations from the Exchange Agreement and assignment. Noble argued that ConocoPhillips would not be unduly prejudiced because it knew about the bankruptcy and that trial was not set until June 2013.

ConocoPhillips responded that Noble failed to meet the standard for withdrawing admissions and that its request was simply a matter of legal strategy, not a mistake, and that ConocoPhillips would be unduly prejudiced and withdrawal would not serve legitimate discovery and the merits.

On December 10, 2012, the trial court[7] held a hearing on Noble's motion to withdraw and amend admissions, as well as on both parties' motions for summary judgment.[8] Later that same day, the trial court granted Noble's motion to withdraw and amend admissions. On December 11, Noble withdrew its admissions and replaced them with denials. Also on December 11, the trial court denied ConocoPhillips' motions for partial summary judgment. On December 31, the trial court signed an order granting Noble's motion for summary judgment. The court found "as a matter of law that Noble is not a party to, has not assumed or been assigned, and otherwise has no obligation, contractual or otherwise, under, related to, or arising out of the June 14, 1994 Exchange Agreement or the June 30, 1994 Assignment and Bill of Sale between Phillips Petroleum and Alma Energy, Inc. and Texas Petroleum Investment Company or the subject matter of those agreements."

Noble filed a motion to sever, and ConocoPhillips moved for reconsideration of the withdrawal and

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[7] At the time, the Honorable John Donovan was the presiding judge of the 113th Judicial District Court. On January 1, 2013, Judge Donovan began serving as Justice, Place 8, on the Fourteenth Court of Appeals.

[8] According to ConocoPhillips, it requested the opportunity to gather and present additional evidence in the event the trial court granted Noble's motion to withdraw. According to Noble, ConocoPhillips did not seek additional discovery when Noble moved to withdraw. In any event, the record does not reflect that ConocoPhillips formally moved for a continuance or moved for leave to amend the summary judgment record.

summary judgment decisions. The trial court[9] held a hearing on March 22, 2013. The court orally agreed to permit ConocoPhillips to conduct additional discovery. The parties filed dueling motions to compel and for a status conference to vacate. The trial court[10] held a hearing on May 31, 2013. In June 2013, the trial court signed an order that Noble produce a corporate representative to give testimony and documents regarding (1) tax payments made per the Exchange Agreement; (2) Noble's operations on the Johnson Bayou Field property; and (3) Noble's cleanup of the tank battery following the bankruptcy order, as well as documents "under which the business of Elysium was acquired by or merged with Noble."

In July 2013, ConocoPhillips submitted supplemental briefing and summary judgment evidence. Noble objected and moved to strike the briefing and evidence. The trial court held a hearing on August 16, 2013, on Noble's motions to strike and to sever and ConocoPhillips' motion for reconsideration. The trial court signed an order on August 28 denying ConocoPhillips' motions to reconsider the summary judgment orders. That same day, the court also granted Noble's motion to sever, stating that the court's December 31, 2012 order granting Noble's summary judgment motion was final and appealable.

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[9] The interim judge presiding over this hearing was the Honorable Larry Weiman, of the 80th Judicial District Court.

[10] At the time, the Honorable Michael Landrum had been appointed judge of the 113th Judicial District Court.

ConocoPhillips timely appealed the final judgment and all interlocutory orders that merged into it. On appeal, ConocoPhillips brings four issues: whether the trial court (1) abused its discretion in permitting Noble to withdraw its express admissions; (2) otherwise erred in denying ConocoPhillips' motion for partial summary judgment where the evidence conclusively established Noble's contractual indemnity obligation; and (3) erred in granting Noble's motion for summary judgment because ConocoPhillips conclusively proved that Noble's obligations were not discharged in bankruptcy or (4) where the evidence created a fact issue on the same.

II. ANALYSIS

A. The trial court did not abuse its discretion in allowing Noble to withdraw its admissions.

ConocoPhillips contends that the trial court abused its discretion in permitting Noble to withdraw its admissions 4 and 5. We disagree.

A party may withdraw or amend an admission if: (a) the party shows good cause for the withdrawal or amendment, and (b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission. Tex. R. Civ. P. 198.3. "Good cause is established by showing that the failure involved was an accident or mistake, not intentional or the result of conscious indifference." *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam). A trial court has broad discretion to permit or deny the withdrawal of admissions. *See Stelly v. Papania*, 927

S.W.2d 620, 622 (Tex. 1996) (per curiam). We only set aside the trial court's ruling if, after reviewing the entire record, it is clear that the court abused its discretion. *Id.*

ConocoPhillips argues that Noble did not establish good cause because its admissions were not the result of mistake or inadvertence[11] where Noble made the same admissions consistently in letters to its insurer and in a counterclaim filed against its insurer, and cannot establish good cause by asserting it did not realize the implications of its admissions. In addition, ConocoPhillips argues that it was unduly prejudiced by the belated withdrawal and that the belated order permitting discovery did not cure such prejudice.[12]

Noble insists that the requested admissions are irrelevant because they involved legal questions as opposed to facts under rule 198.1.[13] Further, Noble

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[11] Specifically, ConocoPhillips argues that Noble's conduct does not fall within *Stelly*, where the movant testified he subsequently discovered a surveyor's report showing he did not own the property in issue, or *Jones v. State*, No. 03-96-00192-CV, 1998 WL 318969 (Tex. App.—Austin June 18, 1998, no pet.) (not designated for publication), where the movant explained it mistakenly admitted the gasoline blended stocks at issue as taxable gasoline but it had used the wrong statutory definition of gasoline.

[12] ConocoPhillips relies on *Morgan v. Timmers Chevrolet, Inc.*, 1 S.W.3d 803 (Tex. App.—Houston [1st Dist.] 1999, pet. denied), where the court found undue prejudice in a premises defect case. Unlike here, in *Morgan*, the defendant waited more than two years, after trial had already begun, to attempt withdrawal and the plaintiffs had entirely foregone other evidentiary avenues. *Id.* at 806-07.

[13] *See Time Warner, Inc. v. Gonzalez*, 441 S.W.3d 661, 668 (Tex. App.—San Antonio 2014, pet. denied) ("Therefore, requests for

contends its admissions 4 and 5[14] were the result of an accident or mistake in that Noble only intended to admit that certain rights and obligations in the Johnson Bayou field were transferred through bankruptcy from Alma to Elysium, and once it realized ConocoPhillips' interpretation was different, i.e., that Noble was admitting "Elysium assumed all obligations under the Exchange Agreement and the Assignment," it promptly emailed counsel about the mistake[15] and then timely moved to amend. Noble also argues that its withdrawal did not delay trial or significantly hamper ConocoPhillips' ability to prepare.

Keeping in mind that that "[t]he primary purpose of requests for admission is to simplify trials by eliminating matters about which there is no real controversy," *Peralta v. Durham*, 133 S.W.3d 339, 341 (Tex. App.—Dallas 2004, no pet.)[16]; that whether and what, if any, obligations Elysium had assumed from Alma stemming from the Exchange Agreement was in dispute; and that "[e]ven a slight excuse will suffice, especially where delay or prejudice will not result

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admission are improper and ineffective when used to establish controverted issues that constitute the fundamental legal issues in a case."); *Elliott v. Newsom*, No. 01- 07-00692-CV, 2009 WL 214551, at *2-3 (Tex. App.—Houston [1st Dist.] Jan. 29, 2009, no pet.) (mem. op.) (reversing summary judgment based on deemed admissions involving meaning of unambiguous contract).

[14] However, we note in its brief "Noble agrees that it is Elysium's successor for the purposes of this appeal."

[15] The record reflects that Noble contacted ConocoPhillips the day after ConocoPhillips filed its November 2012 motion for partial summary judgment, which relied on Noble's admissions.

[16] *See Stelly*, 927 S.W.2d at 622.

against the opposing party," *Kheir v. Progressive Cnty. Mut. Ins. Co.*, No. 14-04-00694-CV, 2006 WL 1594031, at *5 (Tex. App.—Houston [14th Dist.] June 13, 2006, pet. denied) (mem. op.), we cannot conclude that the trial court committed a clear abuse of discretion by permitting Noble to withdraw its admissions.

We overrule ConocoPhillips' first issue.

B. The trial court's summary judgment decisions

Because the remaining issues all relate to the trial court's decisions to grant summary judgment in favor of Noble and against ConocoPhillips, we consider them together.

1. Standard of review

When both parties move for summary judgment and a trial court grants one motion and denies the other, as here, we consider both sides' summary-judgment evidence, determine de novo all issues, and render the judgment the trial court should have rendered. *See Gilbert Tex. Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010) (subs. op.); *NuStar Energy, L.P. v. Diamond Offshore Co.*, 402 S.W.3d 461, 465 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The movant is entitled to summary judgment when it demonstrates that no genuine issues of material facts exist and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Evidence is conclusive if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). When deciding whether a fact issue exists, we accept all evidence favorable to the nonmovant and resolve any doubts in its favor.

Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005); *Burroughs v. APS Int'l, Ltd.*, 93 S.W.3d 155, 159 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

2. Contract interpretation

The construction of an unambiguous contract presents a question of law subject to de novo review. *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011); *Washington Square Fin., LLC v. RSL Funding, LLC*, 418 S.W.3d 761, 767 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Our primary concern in interpreting a contract is to ascertain and to give effect to the intentions of the parties as expressed in the instrument. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). We therefore give terms their plain and ordinary meaning unless the contract indicates that the parties intended a different meaning. *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009). We construe indemnity agreements under normal rules of contract construction. *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000). We examine and consider the entire writing in an effort to harmonize and give effect to all provisions of the contract, so that none will be rendered meaningless. *J.M. Davidson*, 128 S.W.3d at 229.

Whether a contract is ambiguous is a legal question for courts to decide. *Gulf Ins.*, 22 S.W.3d at 423; *see Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). "A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). A

contract is not ambiguous simply because the parties advance conflicting interpretations. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). If the contract is subject to more than one reasonable interpretation after applying the pertinent rules of contract construction, then the contract is ambiguous and there is a fact issue regarding the parties' intent. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 806 (Tex. 2012); *J.M. Davidson*, 128 S.W.3d at 229. Here, neither party argues that the contracts at issue are ambiguous—each simply insists its respective interpretation is the correct one.

C. The parties' competing positions on summary judgment

1. The Asset Purchase and Sale Agreement

ConocoPhillips argues that even without Noble's admissions, it presented conclusive proof of Noble's duty to defend/indemnify. According to ConocoPhillips, uncontroverted evidence shows Noble merged with Elysium and assumed all of Elysium's contractual obligations, which included the Exchange Agreement's indemnity obligation. ConocoPhillips asserts the record conclusively establishes that Elysium purchased the Exchange Agreement from Alma's bankruptcy estate in 2000.

Under section 1.01(d) of the Asset Purchase and Sale Agreement, Elysium agreed to purchase:

> All of Seller Companies' rights and interests in and to all contracts, agreements, purchase orders, real property, real estate leases, and personal property leases in any way associated with the Assets, including but not

> limited to, those Material Contracts (as defined hereinafter) described on Exhibit "D"[17] hereto; and all of Seller Companies' claims and rights under all notes, evidences of indebtedness, and deposits; and all rights and claims to refunds and adjustments of any kind owned by Seller Companies.

ConocoPhillips asserts that the Exchange Agreement is a contract "associated" with the Johnson Bayou field Asset falling within section 1.01(d). ConocoPhillips points out that the Asset Purchase and Sale Agreement did not exclude contracts involving vested assets and did not otherwise include the Exchange Agreement as an Excluded Asset in section 1.02[18] of the Asset Purchase and Sale Agreement.

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[17] Exhibit D does not list the Exchange Agreement.

[18] Section 1.02, Excluded Assets, provides:

> The Parties hereto agree that the following items shall be excluded from the Assets conveyed to [Elysium] by Seller Companies hereunder (the "Excluded Assets"):
>
> (a) Any Causes of Action (as such term is defined in the Plan) or other Assets that are assigned to the Unsecured Creditors or are released pursuant to the Plan;
>
> (b) Any of the Assets [Elysium] elects not to acquire pursuant to 5.02(d); and
>
> (c) Any of the Assets determined by [Elysium], as consented to by Seller Companies and the Bank Group in writing prior to Confirmation (as such term is defined under the Plan) of the Plan, which consent shall not be unreasonably withheld, delayed or conditioned, as having liabilities directly associated with such Assets which exceed the Allocated Value (as such term is defined hereinafter) for such Asset, provided, however,

ConocoPhillips further argues that it would not make sense for Elysium to be able to assume rights but not obligations under the contracts it was purchasing.

Noble responds that ConocoPhillips is wrong when it asserts that Elysium assumed the Exchange Agreement with Alma's liabilities. Although it maintains Elysium was not assigned the Exchange Agreement at all under the Asset Purchase and Sale Agreement, Noble contends that even if a party's rights under a contract are assigned, the assignee is not obligated to perform the assignor's obligations unless it expressly assumes them. Noble further insists that the plain language of the Asset Purchase and Sale Agreement is inconsistent with the interpretation that Elysium assumed Alma's obligations from the Exchange Agreement.

To the extent Noble argues a purchaser of assets does not necessarily automatically assume liabilities and obligations of the seller, we generally agree that may be the case in certain successor-liability

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> that the exclusion of such Asset cannot create an "Excess Liabilities Escrow Claim". As used in this Agreement, an "Excess Liabilities Escrow Claim" shall mean an administrative, priority or other claim against the Seller Companies which must be paid in cash on the Effective Date and which, together with all other claims to be paid from the Liabilities Escrow pursuant to Section 1.04(a), exceeds the funds in the Liabilities Escrow (except to the extent such amount may be increased pursuant to Sections 5.02(d) and 6.01(1)).

contexts.[19] Moreover, in the context of assignment of a contract, the assignee only can be held liable under the predecessor's contract if the assignee expressly or impliedly assumes the predecessor's contractual obligations. *See Jones v. Cooper Indus., Inc.*, 938 S.W.2d 118, 125-26 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *see also NextEra Retail of Tex., LP v. Investors Warranty of Am., Inc.*, 418 S.W.3d 222, 226-27 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (discussing *Jones*).

Under the plain language of the Asset Purchase and Sale Agreement, presuming that the Exchange Agreement does fall within Elysium's agreement to purchase "rights and interests in and to all contracts" in section 1.01(d), this does not automatically mean Elysium also agreed to purchase all obligations and liabilities contained within the Exchange Agreement. This is particularly the case where the Asset Purchase

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[19] *See C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 780 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (recognizing that in asset transfer, in context where Business Corporation Act applies, successor acquires assets of corporation without incurring any of grantor corporation's liabilities unless successor expressly assumes those liabilities); *Lockheed Martin Corp. v. Gordon*, 16 S.W.3d 127, 139 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) ("To impose liability for a predecessor's torts, the successor corporation must have expressly assumed liability." (citing same section of Business Corporation Act)); *see also E-Quest Mgmt., LLC v. Shaw*, 433 S.W.3d 18, 23-24 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (citing recodification within section 10.254 of Texas Business Organizations Code).

and Sale Agreement in sections 1.04[20] and 8.03[21] includes express provisions detailing what Assumed

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[20] Section 1.04, Assumed Liabilities, provides:

> In consideration for the sale of the Assets, [Elysium] shall be responsible for the liabilities described in this Section 1.04 (collectively the "Assumed Liabilities") on the terms and conditions set forth below and elsewhere in this Agreement.
>
> 1.04(a) The Liabilities Escrow (as hereinafter defined) shall be used to satisfy and pay, any and all liabilities of the Debtors as set forth in the Plan as confirmed (as limited and modified thereunder), including, but not limited to:
>
> (1) The amount of the Unsecured Creditors Reserve (as such term is defined in the Plan);
>
> (2) The Podolsky Reserve (as such term is defined in the Plan);
>
> (3) Administrative and priority claims as provided for in the Plan;
>
> (4) Any and all liabilities, claims and/or costs, that are detailed in Exhibit "P" hereto, to cure defaults under those assumed executory contracts and unexpired leases (and hydrocarbon leases to the extent not treated as executory contracts and unexpired leases pursuant to the bankruptcy code) that are provided for in the Plan; and
>
> (5) Any liability of the Seller Companies arising under any consent decree entered between Debtors and any State of Louisiana Regulatory Authority, the United States Environmental Protection Agency or the United States Department of Justice in relation to Equinox's operations in Lake Washington Field, Plaquemines Parish, Louisiana, as further described in Exhibit "M" hereto, provided however, any such assumption shall in no manner effect, release or relieve any obligation or claim

with regard to any insurance carrier or coverage of Seller Companies with regard thereto;

Notwithstanding the foregoing, subject to Bankruptcy Court approval pursuant to the Confirmation Order (as such term is defined in the Plan), [Elysium], at its option and in its sole and absolute discretion, which option must be exercised prior to Confirmation as set forth in the Plan, may assume from Seller Companies at Closing some or all of the Assumed Liabilities described in this Section 1.04(a), in which case the cash amount of the Liabilities Escrow shall be reduced by the face amount, or such other amount as determined by the Bankruptcy Court, of all such Assumed Liabilities.

1.04(b) The following liabilities shall be assumed by [Elysium] and not paid from the Liabilities Escrow:

(1) As detailed in Exhibit "F" hereto, liabilities and claims associated with suspended royalty, working interests or related obligations;

(2) Any and all liabilities or claims associated with bonds, escrow agreements and deposit agreements to the extent they are assumed as part of the Assets and are to remain or are required to be in place subsequent to the Effective Date;

(3) Any and all liabilities or claims associated with the "Commodity Hedge Facility" created in favor of DnB and as described in Exhibit "E" hereto;

(4) Any and all liabilities, claims and/or costs, that are incurred on a current basis and have not yet been paid, in each case in the normal course of business of the Seller Companies prior to Closing; and

(5) Any and all liabilities or claims associated with the "DnB Letters of Credit." As used herein, the "DnB Letters of Credit" shall mean both (i) the

> Letter of Credit in the amount of $800,000.00 issued on October 5, 1995 by DnB for the benefit of Chevron U.S.A., Inc., as subsequently amended and extended pursuant to the terms thereof, and (ii) the Letter of Credit in the amount of $20,000.00 issued on October 1, 1996 by DnB for the benefit of the Woodlands Office Equities-95 Ltd, as subsequently amended and extended pursuant to the terms thereof, provided the liability under either such Letter of Credit may not be increased prior to Closing without [Elysium's] prior written consent. The assumption of the DnB Letters of Credit by [Elysium] pursuant to this Agreement shall be on terms and conditions consented to by DnB, or in the event of failure to obtain such consent from DnB, the DnB Letters of Credit shall be replaced by [Elysium] on or prior to Closing;
>
> 1.04(c) The right at the sole option of [Elysium], to assume any and all liabilities or claims associated in any manner with insurance policies and bonds, for any coverage related to [Elysium's] operations subsequent to the Effective Date, provided however, that [Elysium] shall be obligated to assume or replace all bonding obligations required for the operation of Assets to be transferred to [Elysium] pursuant to this Agreement.

[21] In pertinent part, section 8.03, Buyer's Post-Closing Obligations, provides:

> After Closing, [Elysium] shall have the following obligations ("Assumed Obligations"):
>
> ...
>
> (b) ... (iii) perform obligations under any executory contracts or unexpired oil and gas leases expressly assumed hereunder and (iv) to comply with any Consent Agreement and/or Decree entered between Seller Companies, the United States Environmental Protection Agency, United States Department of Justice and/or any Louisiana environmental authority,

Liabilities and Assumed Obligations Elysium was agreeing to assume. Further, section 1.06, Liabilities, of the Asset Purchase and Sale Agreement provides:

> Except for the Assumed Liabilities and Assumed Obligations (as such term is defined in Section 8.03 below) assumed pursuant to the terms and conditions hereof, [Elysium] is not assuming any liability of any of the Seller Companies, or related to the Assets of any kind or description whatsoever.

Inclusion of this section is consistent with the interpretation that a certain limited set of liabilities and obligations would be transferred to Elysium as part of the bankruptcy proceedings, pursuant to the Asset Purchase and Sale Agreement. Therefore, we cannot find summary judgment in favor of ConocoPhillips on the basis that section 1.01(d) acted to transfer both Alma's rights *and* obligations in the Exchange Agreement to Elysium.

2. Whether the Exchange Agreement was assumed and assigned as an executory contract

We must also determine whether the Exchange Agreement's obligations otherwise were expressly

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> and to comply with any Environmental Laws (defined below) to the extent that any such obligation or liability is attributable to events or periods of time after the Effective Date....

Such provision further required Elysium to return to Seller Companies after closing any money or property belonging to them; assume various obligations as owner of the assets arising after the closing date; and allow Seller Companies access to certain of their records.

assumed by Elysium within the Asset Purchase and Sale Agreement. In making this determination, we remain mindful that the sale took place within the bankruptcy context. Therefore, we must determine whether the Exchange Agreement is an executory contract, whether Alma assumed the Exchange Agreement under section 365, and then whether it assigned its rights and obligations to Elysium. *See* 11 U.S.C. § 365(f)(2)(A) (2013); *Bonneville Power Admin. v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 253 (5th Cir. 2006) ("According to § 365(f)(2)(A), assumption must precede assignment."); *Compton v. Mustang Eng'g Ltd. (In re MPF Holding U.S. L.L.C.)*, 495 B.R. 303, 321 (Bankr. S.D. Tex. 2013) ("[S]ection 365 is the exclusive provision for dealing with executory contracts in bankruptcy.").

ConocoPhillips argues that under article X of the bankruptcy plan, executory contracts such as the Exchange Agreement were expressly assumed and assigned to Elysium. Sections 10.8 and 10.9 of the plan provide:

> 10.8 Other Executory Contracts and Leases. Subject to the approval of the purchaser under a consummated Auction Sale, or the Liquidating Trustee in the event no Auction Sale is consummated, any Executory Contract or lease not referenced above shall be assumed and assigned to the purchaser or Liquidating Trustee, as the case may be on the Effective Date. In the event not approved by the purchaser under a consummated Auction Sale, or as directed by the Liquidating Trustee in the event no Auction Sale

> is consummated, any such Executory Contract or lease shall be rejected on the Effective Date.
>
> 10.9 Rejection of Contracts. Exhibit "J" of the Disclosure Statement hereto reflects certain agreements, some of which may or may not be binding contracts and may or may not be Executory Contracts, which shall be rejected by the Debtors upon the Effective Date. By no later than July 28, [Elysium] shall notify the Debtors of any leases or executory contracts which are not set forth on Exhibit "J" and which [Elysium] elects not to have assumed and assigned to it by the Debtors ("Contract Election Date"). All leases or executory contracts which are not (i) rejected or the subject of a motion to reject as of the Confirmation Hearing, (ii) on Exhibit "J" or (iii) on the list provided by [Elysium] to Debtors on or before the Contract Election Date pursuant to this section, shall be assumed by the Debtors and assigned to [Elysium].

ConocoPhillips asserts that the Exchange Agreement was not rejected or subject to a rejection motion as of the date of the confirmation hearing, was not listed in a particular exhibit to the disclosure statement, and was not expressly rejected by Elysium by the contract election date.

Based on the plain language of the plan,[22] we agree that the plan indicates that Alma was expressly assuming all executory contracts not otherwise

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[22] *See MPF Holding*, 495 B.R. at 316 (considering whether plain language of plan and order indicated that novation agreement at issue was assumed and assigned).

rejected pursuant to a motion to reject, rejected as expressly listed by Alma in the disclosure statement, or rejected on the list as provided by Elysium. We also agree that the record here reflects that the Exchange Agreement was not the subject of a rejection motion, was not disclosed in exhibit J of the disclosure statement, and was not listed on Elysium's listing of executory contracts for rejection. We further note the bankruptcy court's confirmation order, paragraph 15, is consistent with this interpretation, providing that except for contracts and agreements already assumed or rejected, "those Executory Contracts and Unexpired Leases proposed to be assumed and assigned to [Elysium] ... pursuant to the Plan are ordered assumed and assigned to [Elysium]." The order stated that executory contracts and unexpired leases proposed to be rejected pursuant to the plan and the section 365 notices are ordered rejected. The order also stated that Elysium has "provided adequate assurance of future performance of all Executory Contracts and Unexpired Leases being assumed and assigned to it."

Noble contends that ConocoPhillips relies too heavily on the plan and insists that the Asset Purchase and Sale Agreement provides a different interpretation relating to assumption by Alma and assignment to Elysium. However, our review of the plain language of the Asset Purchase and Sale Agreement is consistent with the plan's language that Alma would assume all remaining executory contracts and leases and assign them to Elysium. Within the agreement in section 8.03(b), Elysium agreed that post-closing it "shall have" the following "Assumed Obligation"—to "perform obligations under any

executory contracts or unexpired oil and gas leases expressly assumed hereunder." The Asset Purchase and Sale Agreement included section 1.03, which described the bankruptcy plan as "incorporating the terms and conditions as set forth in this Agreement," and article VI included conditions to closing, which stated that the plan "materially conforms to the terms and conditions of this Agreement" and that "this Agreement shall specifically be approved by the Bankruptcy Court and shall be incorporated as part of the Plan." In section 8.04(b), Alma agreed to be responsible post-closing for all claims and liabilities with respect to the assets accruing or relating to the times prior to the effective time, essentially the morning of closing, "[e]xcept for those matters expressly assumed by [Elysium]." And under section 8.09, the provisions of article VIII, including Elysium's assumed obligations, "shall survive the Closing."

Moreover, the indemnification provisions of the Asset Purchase and Sale Agreement can be harmonized with the interpretation that Alma assumed and assigned all remaining executory contracts to Elysium. Both Elysium and Alma in sections 8.05 and 8.06 agreed to indemnify the other from and against claims arising from or attributable to their respective periods of ownership and operation of the assets and any breaches of their respective "representations, warranties, covenants, or agreements hereunder." However, under section 8.05, Indemnification by Buyer, in addition, Elysium agreed to indemnify Alma from and against all claims arising from or attributable to "THE ASSUMED OBLIGATIONS." Therefore, we cannot agree with Noble that ConocoPhillips' interpretation of the Asset

Purchase and Sale Agreement renders sections 8.04(b) and 8.06 meaningless.[23]

Having concluded the plain language of the Asset Purchase and Sale Agreement, and of the plan and the order, aligns with ConocoPhillips' interpretation that Alma assumed remaining executory contracts and any such executory contracts were assigned to Elysium as "assumed obligations," we proceed to determine whether the Exchange Agreement constitutes an executory contract within section 365 of the bankruptcy code. Based on our review of the governing law and of the agreement, we conclude that the answer is yes.

According to ConocoPhillips, the unperformed, remaining mutual indemnity obligations rendered the Exchange Agreement executory for the purposes of section 365 of the bankruptcy code. In addition, ConocoPhillips insists the Exchange Agreement "contained many more remaining obligations than just the mutual indemnification obligations."[24]

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[23] We do not find Noble's post-submission authority, *In re Allegheny Health, Education & Research Foundation*, 383 F.3d 169 (3d Cir. 2004), persuasive on the point that Elysium did not expressly assume obligations from executory contracts within the Asset Purchase and Sale Agreement. In contrast to *Allegheny*, *see id.* at 172, Elysium's assumed obligations did not turn on any temporal distinction, but rather the buyer Elysium after closing "shall" be responsible to "perform obligations under any executory contracts ... expressly assumed hereunder," which reasonably can be harmonized with Elysium's agreement to indemnify the debtors from claims attributable to "the assumed obligations." Further, Elysium's assumed obligations were to survive closing.

[24] In addition to the indemnity and environmental cleanup provisions within the Exchange Agreement, ConocoPhillips

ConocoPhillips primarily relies on *In re Safety-Kleen Corp.*, 410 B.R. 164, 167-68 (Bankr. D. Del. 2009), wherein the bankruptcy court concluded that a stock purchase agreement involving some unperformed, remaining mutual indemnification obligations relating to certain environmental matters was an executory contract. *See also Philip Servs. Corp. v. Luntz (In re Philip Servs. (Del.), Inc.)*, 284 B.R. 541, 548-50 (Bankr. D. Del. 2002) (merger agreement imposed similar unperformed indemnification obligations on both parties, as well as remaining non-monetary obligations, and was executory).[25]

In contrast, Noble takes the position that the Exchange Agreement was not an executory contract.[26]

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places much emphasis on Alma's 17-year-long reservation of production payments on the Lake Washington leases within the Exchange Agreement (and attempts to place much emphasis on alleged evidence of Elysium's and Noble's post-bankruptcy acceptance of payments from Phillips and later ConocoPhillips). However, we note this payment obligation was one-sided and monetary in nature such that on its own it would be insufficient to render the Exchange Agreement executory.

[25] ConocoPhillips also relies on *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.)*, 756 F.2d 1043, 1045-46 (4th Cir. 1985), wherein the Fourth Circuit concluded that a technology licensing agreement involving one party's unperformed, continuing obligations of notice and forbearance in licensing and contingent defense and indemnification obligations and the other party's unperformed, continuing obligations of accounting for and paying royalties, delivering sales reports and keeping accounting records, and keeping license technology in confidence rendered the contract executory as to both parties.

[26] Although Noble makes much of the fact that Phillips expressly moved the bankruptcy court to compel Alma and Equinox to assume or reject a particular processing agreement as

First, Noble points to cases indicating that contracts where the only remaining performance is monetary in nature are not executory, and where the courts have found contracts containing a continuing indemnification obligation nonexecutory. *See, e.g., In re Farmland Indus., Inc.*, 318 B.R. 159, 163 (Bankr. W.D. Mo. 2004); *In re Spectrum Info. Technologies, Inc.*, 190 B.R. 741, 748 (Bankr. E.D.N.Y. 1996); *In re Chateaugay Corp.*, 102 B.R. 335, 347 (Bankr. S.D.N.Y. 1989). Noble argues that, as in these cases, the Exchange Agreement was fully consummated and performed, except for future, contingent environmental liabilities.[27]

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an executory contract pursuant to section 365(d)(2), Noble acknowledges Phillips did not have to make any such request with regard to the Exchange Agreement for it to be assumed here.

[27] In addition, at argument and in post-submission briefing, Noble relies on *Lewis Brothers Bakeries Inc. v. Interstate Brands Corp. (In re Interstate Bakeries Corp.)*, 751 F.3d 955, 964 (8th Cir. 2014) (en banc), where the appellate court concluded that a license agreement pertaining to intellectual property was not executory in the larger context of a $20 million mainly-tangible asset sale. In *Interstate Bakeries*, the bankruptcy court concluded that the remaining obligations of only *one* party were material. *Id.* at 963. In reversing the district court, the court of appeals noted to conclude that a contract is executory under section 365, the bankruptcy court must find that "*both* parties have so far underperformed that a failure of *either* to complete performance would constitute a material breach excusing the performance of the other." *Id.* (citing *Kaler v. Craig (In re Craig)*, 144 F.3d 593, 596 (8th Cir. 1998), and emphases in original). The court of appeals determined that the contract at issue in *Interstate Bakeries* was not executory because the other party had substantially performed and its remaining obligations did not relate to the purpose of the agreement: they concerned only one of the assets included in the sale. 751 F.3d at 963-64. In other

Pursuant to section 365, subject to the bankruptcy court's approval, any executory contract of the debtor may be assumed or rejected. 11 U.S.C. § 365(a) (2013); *see Century Indem. Co. v. Nat'l Gypsum Co. Settlement Trust (In re Nat'l Gypsum Co.)*, 208 F.3d 498, 504 (5th Cir. 2000) ("Under § 365, a debtor may elect one of two options when assessing how to treat an executory contract or unexpired lease to which it is a party; the contract or lease may either be rejected or assumed.").[28] This provision allows a trustee to relieve the bankruptcy estate of a burdensome agreement that has not been completely performed. *Phoenix Exploration, Inc. v. Yaquinto (In re Murexco Petroleum, Inc.)*, 15 F.3d 60, 62 (5th Cir. 1994) (per curiam). The decision whether to assume or reject under section 365 is generally left to the business judgment of the bankruptcy estate. *See Mirant Corp. v. Potomac Electric Power Co. (In re Mirant Corp.)*, 378 F.3d 511, 524 n.5 (5th Cir. 2004).

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words, the appellate court determined there were no remaining mutual, material obligations between the parties. In contrast, here, as explained *infra*, Alma and Phillips had mutual, material obligations the nonperformance of which would have resulted in a material breach of the Exchange Agreement at the time that Alma filed its bankruptcy petition.

[28] When an executory contract is rejected under section 365 of the bankruptcy code, it is treated as if the contract had been breached immediately before the date of the bankruptcy petition's filing; any claim arising from that breach is therefore a prepetition claim. *See* 11 U.S.C. §§ 365(g)(1), 502(g) (2013). An executory contract may not be assumed if there has been a default, unless such default is cured at the time of assumption. *See id.* § 365(b).

Although the bankruptcy code does not define "executory contract," "[c]ourts applying § 365(a) have indicated that an agreement is executory if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party." *Murexco Petroleum*, 15 F.3d at 62-63 & n.8 (noting that source of this definition "is a two-part article by Professor Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 458-62 (1973), and *Executory Contracts in Bankruptcy: Part II*, 57 Minn. L. Rev. 479 (1974)"); *see Potomac Electric*, 378 F.3d at 518 n.3 ("Section 365(a) does not define executory contract, but the legislative history of that section indicates that the term means a contract 'on which performance is due to some extent on both sides.'").[29] "Whether an obligation is material is tested at the time of the filing of the bankruptcy petition." *Safety-Kleen*, 410 B.R. at 167; *see Murexco Petroleum*, 15 F.3d at 62. Therefore, to determine if the Exchange Agreement was executory at the time that Alma filed its bankruptcy petition, we must consider whether Alma and Phillips had duties the nonperformance of which would have constituted a material breach of the Exchange Agreement at the time of the filing of the petition. *See Murexco Petroleum*, 15 F.3d at 62-63.

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[29] Essentially, both ConocoPhillips and Noble agree that the Countryman definition of an executory contract is applicable here. *See In re Tex. Wyo. Drilling, Inc.*, 486 B.R. 746, 754 (Bankr. N.D. Tex. 2013) (noting that Fifth Circuit has adopted Countryman definition).

Contingent material obligations are sufficient to render a contract executory. *Safety-Kleen*, 410 B.R. at 168. That is, a contingent material obligation, even though not yet triggered on a debtor's petition date, is nevertheless executory until expiration of the contingency because "[u]ntil the time has expired during which an event triggering a contingent duty may occur, the contingent obligation represents a continuing duty to stand ready to perform if the contingency occurs." *Richmond Metal*, 756 F.2d at 1046. Further, it is well-settled that an executory contract cannot be assumed in part and rejected in part. *Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (per curiam). That is, "[w]here the debtor assumes an executory contract, it must assume the entire contract, *cum onere*—the debtor accepts both the obligations and the benefits of the executory contract." *Century Indem.*, 208 F.3d at 506.

We find *Safety-Kleen* and *Philip Services*, bankruptcy court opinions which both applied the Countryman definition of executory contract, to be particularly instructive. The *Safety-Kleen* court considered the pertinent indemnity section of the stock purchase contract at issue, which provided that "subject to a certain dollar limit, Westinghouse and Rollins each held contingent, unliquidated rights of indemnification against the other with respect to any and all damages arising from pre-and-post-closing environmental matters, including contamination relating to the Coffeyville Facility." 410 B.R. at 166. After acknowledging that "a contract is executory if both parties have unperformed obligations that, if not completed, would result in a material breach," *id.* at

167, and considering that "[c]ourts have ruled that contingent obligations under a contract are sufficient to render a contract executory when the contingent obligations are essential to the contract," *id.* at 168, the court concluded that the indemnity provisions of the stock purchase agreement at issue were material and the agreement was an executory contract at the time of the debtors' filing for bankruptcy, *id.* at 169-70. In doing so, the *Safety-Kleen* court noted how the indemnity provisions provided benefits and burdens to both parties that continued at the time of the debtors' filing for bankruptcy: "Stated succinctly, the indemnity provisions were not nullities." *Id.* at 169.

Likewise, in *Philip Services*, the bankruptcy court considered whether a merger agreement was executory for purposes of section 365. 284 B.R. at 547. The dispute centered over whether additional material obligations remained due from both parties. *Id.* In concluding that the contract was executory, the bankruptcy court considered that one party remained obligated to perform environmental remediation duties associated with the properties and that the other party remained obligated for ongoing environmental compliance at certain contaminated sites. *Id.* at 547-48. In addition, under the agreement, there were similar, continuing, largely unperformed indemnification obligations remaining as to both parties. *Id.* at 548-49. The court rejected the argument that the merger agreement was "not an executory contract because the unperformed indemnification obligations are not material," distinguishing *Chateaugay Corp.* and similar cases "where one party has completed performance, ... or where the only performance that remains is the payment of money."

Philip Servs., 284 B.R. at 549 (quoting *Chateaugay Corp.*, 102 B.R. at 348) (emphasis omitted). In contrast to such cases, the court noted how "neither side has completed performance and both sides have monetary and non-monetary obligations remaining." *Id.* at 549. Although the court acknowledged that the merger agreement had a principal purpose of the sale of the corporation and its assets, it concluded that the future mutual obligations, including "the promise to indemnify," were "substantial element[s] of the overall transaction." *Id.* at 550 (discussing *Waldschmidt v. Metro. Lincoln-Mercury, Inc. (In re Preston)*, 53 B.R. 589, 591 (Bankr. M.D. Tenn. 1985)); *see also In re AbitibiBowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009) (citing *Safety-Kleen*, 410 B.R. at 168, and *Philip Servs.*, 284 B.R. at 549-50, and concluding that mutual continuing indemnity obligations for environmental damage caused by mill operation were material and call agreement containing them was executory).

Unlike the cases cited by Noble,[30] the Exchange Agreement here contains continuing, mutual, future,

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[30] In *Farmland Industries*, the indemnification obligation at issue was one-sided and there were no outstanding mutual obligations. 318 B.R. at 163. The former employer's remaining obligation to defend and indemnify and make termination payments at issue in *Spectrum Information Technologies* likewise only involved monetary payment and was one-sided, while the former employee's remaining obligations of confidentiality and noninterference were not material. 190 B.R. at 748 (concluding employment agreement was not executory). And in *Chateaugay Corp.*, the bankruptcy court distinguished cases in which there were mutual, continuing obligations and concluded that the indemnity obligation at issue was one-sided and the other side had no similar outstanding obligation. 102 B.R. at 348-49. These cases are inapposite to our analysis

largely unperformed, material obligations, both monetary and nonmonetary in nature. Both Alma and Phillips respectively agreed to defend and indemnify the other from and against all claims caused by or arising out of the presence, disposal, release, or threatened release of hazardous substances or waste before, during, or after ownership of the exchanged assets, and to defend and indemnify the other from and against all claims, including contamination of natural resources, resulting from or arising out of any liability caused by or connected with the presence, disposal, or release of any material in, under, or on the exchanged assets at the time of or after assignment. We take particular note of the reciprocal, mutual nature of these indemnity obligations. *See Wilson v. TXO Prod. Corp. (In re Wilson)*, 69 B.R. 960, 962 (Bankr. N.D. Tex. 1987) (noting how legislative history adopts "principle of mutuality" and holding operating agreements where both parties have continuing obligations were executory); *see also In re RoomStore, Inc.*, 473 B.R. 107, 115 (Bankr. E.D. Va. 2012) ("The dispositive distinction is that in this case there was a continuing obligation on each side."). Further, the Exchange Agreement expressly provides that these mutual indemnification obligations indefinitely survive closing and the transfer of the assets; in fact, the parties considered the indemnification obligations to be of such importance that, as noted above, they included these obligations in the assignment conveying the respective leases.

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because, here, the Exchange Agreement between Phillips and Alma contained ongoing mutual obligations that could expose either party to potentially costly hazardous waste clean-up costs.

Moreover, both Alma and Phillips mutually agreed to take all future environmental disposal, cleanup, and remedial actions related to their respective exchanged assets. And, although we acknowledge the Exchange Agreement indicated within its recitals its purposes for Alma and Phillips to effect the transfer of their respective assets, we nonetheless conclude that the remaining mutual indemnification obligations, along with mutual responsibilities regarding environmental cleanup, constituted material obligations. *See Safety-Kleen*, 410 B.R. at 167-70; *Philip Servs.*, 284 B.R. at 549-50. These obligations were detailed in several places in the Exchange Agreement and were largely carried over into the Assignment and Bill of Sale conveying the property to Alma.[31]

In sum, at the time of the filing of the bankruptcy petition, the failure of either Alma or Phillips to complete performance of its mutual obligations would have constituted a material breach of the Exchange Agreement. *See Murexco Petroleum*, 15 F.3d at 62-63. Therefore, we conclude that the Exchange Agreement is an executory contract for purposes of section 365.

3. No remaining fact issues[32]

Having concluded that Alma assumed, and Elysium was assigned, the Exchange Agreement as an

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[31] The Assignment and Bill of Sale was filed of record in the Cameron Parish clerk's office.

[32] As recognized by Noble in its brief, its position rests on "[t]he key point ... that neither East River nor Elysium ever assumed Alma's Exchange Agreement liability in the first place," essentially a privity-of-contract point.

executory contract as part of the bankruptcy proceedings whereby Elysium purchased the assets of Alma through a bankruptcy order and plan confirming the Asset Purchase and Sale Agreement, we consider whether ConocoPhillips conclusively established Noble assumed all the rights and obligations of Patina as a matter of law.

In its brief, Noble acknowledges that "the link between Elysium and Noble" is "not materially in dispute" and "agrees that it is Elysium's successor for the purposes of this appeal." Nevertheless, despite

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Because we conclude the Exchange Agreement is an executory contract assumed by Alma, assigned to Elysium, and expressly assumed by Elysium as an obligation pursuant to the Asset Purchase and Sale Agreement and the bankruptcy proceedings, we necessarily reject Noble's defensive positions that Elysium took the bankruptcy assets of Alma "free and clear" and discharged of all claims. Elysium's, and subsequently Noble's, obligation is based on an express, not an "implicit," assumption of liability. *Contra New Nat'l Gypsum Co. v. Nat'l Gypsum Co. Settlement Trust (In re Nat'l Gypsum Co.)*, 219 F.3d 478, 487 (5th Cir. 2000). Nor, even if we accept Noble's position that Elysium as a nondebtor may be entitled to any discharge, do the general discharge provisions of the bankruptcy code appear to operate in the face of expressly assumed executory contracts. *See Century Indem.*, 208 F.3d at 503-04, 509. Typically, claims arising from the rejection, not the assumption, of an executory contract may be discharged by the confirmation of the plan. *See* 11 U.S.C. § 1141(d)(1)(A) (2013).

Because we conclude that the indemnification obligation was part of an executory contract assumed by Alma and assigned to Elysium within the bankruptcy, consistent with the plain language of the Asset Purchase and Sale Agreement, we need not address the parties' arguments regarding the characterization of any indemnification obligation as a so-called covenant running with the land. *See* Tex. R. App. P. 47.1.

Noble's withdrawn merger admission, and even without having to consider the propriety of whether to consider any evidence gathered and supplemented after the trial court rendered summary judgment, our review of the record evidence at the time of summary judgment submission confirms this fact. Therefore, we conclude that ConocoPhillips conclusively established as of December 15, 2004, Noble effected a merger with Patina, of which Elysium was a wholly-owned subsidiary, whereby "all the obligations, duties, debts and liabilities of [Patina] and [Noble Energy Production] shall be the obligations, duties, debts and liabilities of the Surviving Corporation"—Noble Energy Production—as expressly and plainly stated within the Agreement and Plan of Merger executed by Patina, Noble Energy, and Noble Energy Production.

We sustain ConocoPhillips' second and third issues.[33]

III. CONCLUSION

In light of the foregoing, we conclude that the trial court did not abuse its discretion in permitting Noble to withdraw its admissions 4 and 5. However, we conclude the trial court erred in its denial of ConocoPhillips' partial traditional motions for summary judgment and in its granting of Noble's motion for summary judgment. We therefore reverse the trial court's final judgment, render judgment that Noble owes ConocoPhillips a duty of defense and indemnity, and remand for additional proceedings consistent with this opinion.

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[33] We need not reach ConocoPhillips' fourth issue. *See* Tex. R. App. P. 47.1.

/s/ Marc W. Brown
Justice

Panel consists of Justices McCally, Brown, and Wise.

Appendix D

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
113TH JUDICIAL DISTRICT

No. 2011-46437

CONOCOPHILLIPS COMPANY,
Plaintiff,
v.
TEXAS PETROLEUM INVESTMENT COMPANY, et al.,
Defendants.

August 28, 2013

ORDER GRANTING SEVERANCE

The motion of Noble Energy, Inc. to sever claims brought against it in this matter is granted. It is therefore

Ordered that all claims asserted by ConocoPhillips Company against Noble Energy, Inc. in the above styled case are severed from the claims asserted in the captioned matter. It is further

Ordered that the clerk of the Court shall copy and transfer into the file for Cause No. 2011-46437-A, the following documents, with any associated-exhibits:

Plaintiff's Second Amended Petition, filed August 28, 2012;

Noble Energy, Inc.'s First Amended Answer, filed November 30, 2012;

Plaintiffs Motion for Partial Summary Judgment, filed August 10, 2012;

Plaintiffs Motion for Partial Summary Judgment, filed November 13, 2012;

Plaintiff's Supplemental Memorandum in Support of Motion for Partial Summary Judgment, filed November 16, 2012;

Noble Energy, Inc.'s Motion for Summary Judgment, filed November 16, 2012;

Noble Energy Inc.'s Motion for Leave to Withdraw Its Response to ConocoPhillips Company's Request for Admission 4 and 5, filed November 30, 2012;

Noble Energy Inc.'s Response to ConocoPhillips' 8-10-12 and 11-13-12 Motions for Summary Judgment, filed December 3, 2012;

Conoco Phillips Company's Opposition to Noble Energy Inc.'s Motion for Summary Judgment, filed December 3, 2012;

ConocoPhillips Company's Opposition to Noble Energy Inc.'s Motion for Leave to Withdraw and Amend Its Response to ConocoPhillips' Request for Admission 4 and 5, filed December 7, 2012;

Plaintiff's Reply in Support of ConocoPhillips' Motion for Summary Judgment, filed December 7, 2012;

Noble's Motion for Leave to Supplement Summary Judgment Evidence, filed December 7, 2012;

Motion to Strike Exhibits Attached to Conoco's Opposition to Noble's Motion for Summary Judgment, filed December 7, 2012;

Order Granting Noble's Motion to Strike Exhibits Attached to Conoco's Opposition to Noble's Motion for Summary Judgment, signed December 10, 2012;

Order Granting Noble Energy, Inc.'s Motion for Leave to Amend Response to ConocoPhillips Company's Request for Admission No. 4, signed December 10, 2012;

Order Granting Noble's Motion for Leave to Supplement Summary Judgment Evidence, signed December 10, 2012;

Noble Energy Inc.'s Amended Responses to ConocoPhillips Company's Request for Admission Nos 4 and 5, filed December 11, 2012;

Order Denying ConocoPhillips Motion for Partial Summary Judgment Against Noble Energy, Inc., signed December 11, 2012;

Order Granting Noble Energy, Inc.'s Motion for Summary Judgment, signed December 31, 2012;

Noble Energy Inc.'s Motion to Sever Following the Entry of Summary Judgment, filed February 18, 2013;

ConocoPhillips's Motion for Reconsideration and Opposition to Noble's Motion to Sever, filed March 19, 2013;

ConocoPhillips's Supplemental Brief in Support of Its Motion for Reconsideration, Its Motion for Summary Judgment, and Its Opposition to Noble's Motion for Summary Judgment, filed a July 26, 2013;

Noble Energy, Inc.'s Objection and Motion to Strike ConocoPhillips's Supplemental Brief in Support of Its Motion for Reconsideration, Its Motion for Summary Judgment, and Its Opposition to Noble's Motion for Summary Judgment and Attached Exhibits, filed August 13, 2013;

ConocoPhillips's Response to Noble Energy Inc.'s Objection and Motion to Strike, filed August 15, 2013;

Order Denying Plaintiff's Motion for Reconsideration, signed August 28, 2013;

This Order Granting Severance, signed August 28, 2013.

It is further Ordered that, as of the date of this order, the Court's December 31, 2012 Order Granting Noble Energy Inc.'s Motion for Summary Judgment will become final and appealable.

Signed August 28, 2013. [handwritten:signature]
Michael Landrum, Judge

Appendix E

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
113TH JUDICIAL DISTRICT

No. 2011-46437

CONOCOPHILLIPS COMPANY,
Plaintiff,
v.
TEXAS PETROLEUM INVESTMENT COMPANY, et al.,
Defendants.

December 31, 2013

ORDER GRANTING NOBLE ENERGY, INC.'S MOTION FOR SUMMARY JUDGMENT

The court has considered Noble Energy, Inc.'s motion for summary judgment, the response, and argument of counsel and finds as a matter of law that Noble is not a party to, has not assumed or been assigned, and otherwise has no obligation, contractual or otherwise, under, related to, or arising out of the June 14, 1994 Exchange Agreement or the June 30, 1994 Assignment and Bill of Sale between Phillips Petroleum and Alma Energy, Inc. and Texas Petroleum Investment Company or the subject matter of those agreements. It is therefore,

ORDERED that Noble's motion should and hereby is GRANTED. It is further,

ORDERED that judgment should be and hereby is entered against ConocoPhillips Company and in favor of Noble Energy, Inc. on all claims asserted in this case by ConocoPhillips.

Signed this __ day of Dec 31 2012, 2012.

[handwritten: signature]
The Honorable John Donovan
Presiding Judge

Appendix F

11 U.S.C. §365

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly

compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if

any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering

performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for

relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is

provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease,

the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare

interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(*l*) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any

embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(*o*) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such

assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.

Appendix G

EXCERPTS OF RELEVANT BANKRUPTCY RULES

Fed. R. Bankr. P. 1007. Lists, Schedules, Statements, and other Documents; Time Limits

(a) CORPORATE OWNERSHIP STATEMENT, LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND OTHER LISTS.

(1) *Voluntary Case*. In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.

(2) *Involuntary Case*. In an involuntary case, the debtor shall file, within seven days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H as prescribed by the Official Forms.

(3) *Equity Security Holders*. In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within 14 days after entry of the order for relief a list of the debtor's equity security holders of each class showing the number and kind of interests

registered in the name of each holder, and the last known address or place of business of each holder.

(4) *Chapter 15 Case*. In addition to the documents required under §1515 of the Code, a foreign representative filing a petition for recognition under chapter 15 shall file with the petition: (A) a corporate ownership statement containing the information described in Rule 7007.1; and (B) unless the court orders otherwise, a list containing the names and addresses of all persons or bodies authorized to administer foreign proceedings of the debtor, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and all entities against whom provisional relief is being sought under §1519 of the Code.

(5) *Extension of Time*. Any extension of time for the filing of the lists required by this subdivision may be granted only on motion for cause shown and on notice to the United States trustee and to any trustee, committee elected under §705 or appointed under §1102 of the Code, or other party as the court may direct.

(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS REQUIRED.

(1) Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file the following schedules, statements, and other documents, prepared as prescribed by the appropriate Official Forms, if any:

(A) schedules of assets and liabilities;

(B) a schedule of current income and expenditures;

(C) a schedule of executory contracts and unexpired leases;

(D) a statement of financial affairs;

(E) copies of all payment advices or other evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition, with redaction of all but the last four digits of the debtor's social-security number or individual taxpayer-identification number; and

(F) a record of any interest that the debtor has in an account or program of the type specified in §521(c) of the Code.

(2) An individual debtor in a chapter 7 case shall file a statement of intention as required by §521(a) of the Code, prepared as prescribed by the appropriate Official Form. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement.

(3) Unless the United States trustee has determined that the credit counseling requirement of §109(h) does not apply in the district, an individual debtor must file a statement of compliance with the credit counseling requirement, prepared as prescribed by the appropriate Official Form which must include one of the following:

(A) an attached certificate and debt repayment plan, if any, required by §521(b);

(B) a statement that the debtor has received the credit counseling briefing required by §109(h)(1) but does not have the certificate required by §521(b);

(C) a certification under §109(h)(3); or

(D) a request for a determination by the court under §109(h)(4).

(4) Unless §707(b)(2)(D) applies, an individual debtor in a chapter 7 case shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, the information, including calculations, required by §707(b), prepared as prescribed by the appropriate Official Form.

(5) An individual debtor in a chapter 11 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form.

(6) A debtor in a chapter 13 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, a calculation of disposable income made in accordance with §1325(b)(3), prepared as prescribed by the appropriate Official Form.

(7) Unless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition:

(A) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of the course, prepared as prescribed by the appropriate Official Form; and

(B) An individual debtor in a chapter 11 case shall file the statement if §1141(d)(3) applies.

(8) If an individual debtor in a chapter 11, 12, or 13 case has claimed an exemption under §522(b)(3)(A) in property of the kind described in §522(p)(1) with a value in excess of the amount set out in §522(q)(1), the debtor shall file a statement as to whether there is any proceeding pending in which the debtor may be found guilty of a felony of a kind described in §522(q)(1)(A) or found liable for a debt of the kind described in §522(q)(1)(B).

(c) TIME LIMITS. In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days after the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, a debtor who has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A) within 14 days of the order for relief. In a chapter 7 case, the debtor shall file the

statement required by subdivision (b)(7) within 60 days after the first date set for the meeting of creditors under §341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under §1141(d)(5)(B) or §1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in §1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under §705 or appointed under §1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

(d) LIST OF 20 LARGEST CREDITORS IN CHAPTER 9 MUNICIPALITY CASE OR CHAPTER 11 REORGANIZATION CASE. In addition to the list required by subdivision (a) of this rule, a debtor in a chapter 9 municipality case or a debtor in a voluntary chapter 11 reorganization case shall file with the petition a list containing the name, address and claim of the

creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by the appropriate Official Form. In an involuntary chapter 11 reorganization case, such list shall be filed by the debtor within 2 days after entry of the order for relief under §303(h) of the Code.

(e) LIST IN CHAPTER 9 MUNICIPALITY CASES. The list required by subdivision (a) of this rule shall be filed by the debtor in a chapter 9 municipality case within such time as the court shall fix. If a proposed plan requires a revision of assessments so that the proportion of special assessments or special taxes to be assessed against some real property will be different from the proportion in effect at the date the petition is filed, the debtor shall also file a list showing the name and address of each known holder of title, legal or equitable, to real property adversely affected. On motion for cause shown, the court may modify the requirements of this subdivision and subdivision (a) of this rule.

(f) STATEMENT OF SOCIAL SECURITY NUMBER. An individual debtor shall submit a verified statement that sets out the debtor's social security number, or states that the debtor does not have a social security number. In a voluntary case, the debtor shall submit the statement with the petition. In an involuntary case, the debtor shall submit the statement within 14 days after the entry of the order for relief.

(g) PARTNERSHIP AND PARTNERS. The general partners of a debtor partnership shall prepare and file the list required under subdivision (a), schedules of the assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and

unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.

(h) INTERESTS ACQUIRED OR ARISING AFTER PETITION. If, as provided by §541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.

(i) DISCLOSURE OF LIST OF SECURITY HOLDERS. After notice and hearing and for cause shown, the court may direct an entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them. The entity possessing this list may be required either to produce the list or a true copy thereof, or permit

inspection or copying, or otherwise disclose the information contained on the list.

(j) IMPOUNDING OF LISTS. On motion of a party in interest and for cause shown the court may direct the impounding of the lists filed under this rule, and may refuse to permit inspection by any entity. The court may permit inspection or use of the lists, however, by any party in interest on terms prescribed by the court.

(k) PREPARATION OF LIST, SCHEDULES, OR STATEMENTS ON DEFAULT OF DEBTOR. If a list, schedule, or statement, other than a statement of intention, is not prepared and filed as required by this rule, the court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these papers within a time fixed by the court. The court may approve reimbursement of the cost incurred in complying with such an order as an administrative expense.

(*l*) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of every list, schedule, and statement filed pursuant to subdivision (a)(1), (a)(2), (b), (d), or (h) of this rule.

(m) INFANTS AND INCOMPETENT PERSONS. If the debtor knows that a person on the list of creditors or schedules is an infant or incompetent person, the debtor also shall include the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

Fed. R. Bankr. P. 6006.
Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease.

(a) PROCEEDING TO ASSUME, REJECT, OR ASSIGN. A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014.

* * *

(c) NOTICE. Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.

Fed. R. Bankr. P. 9013.
Motions: Form and Service

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:

(a) the trustee or debtor in possession and on those entities specified by these rules; or

(b) the entities the court directs if these rules do not require service or specify the entities to be served.

Fed. R. Bankr. P. 9014. Contested Matters

(a) MOTION. In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.

(b) SERVICE. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d). Any written response to the motion shall be served within the time determined under Rule 9006(d). Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R.Civ.P.

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any

order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

(d) TESTIMONY OF WITNESSES. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.

(e) ATTENDANCE OF WITNESSES. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.