No. 17-1438

In the

Supreme Court of the United States

NOBLE ENERGY, INC.,

Petitioner,

v.

CONOCOPHILLIPS CO.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Texas

BRIEF OF PLAINS ALL AMERICAN PIPELINE L.P. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court may impose onerous contractual obligations on a non-signatory to the contract by disregarding the full-disclosure requirements of federal bankruptcy law and foisting the undisclosed perpetual indemnity obligation of a Chapter 11 debtor upon an unknowing purchaser of related assets.

2. Whether boilerplate "assumed-unless-rejected" language in a bankruptcy reorganization plan renders an undisclosed executory contract assumed under 11 U.S.C. § 365.

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INTEREST OF THE *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Plains All American Pipeline, L.P. ("Plains") respectfully submits this brief amicus curiae in support of Petitioner Noble Energy, Inc.[1]

Plains is a publicly traded master limited partnership that owns and operates midstream energy infrastructure and provides logistics services for crude oil, natural gas liquids and natural gas. As such, Plains has purchased, and wishes to purchase, distressed oil and gas assets in bankruptcy. Your amicus feels compelled to submit this brief to the Court due to the impact this case will have on bankruptcy sales.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Texas Supreme Court's decision to enforce an undisclosed indemnity under the Bankruptcy Code in contrast to state law protections overlooks the protections given by the bankruptcy system, which requires full and complete disclosure of assets, liabilities and executory contracts by a debtor.

It is now commonplace for Chapter 11 cases to be filed to provide a forum to sell a debtor's assets,

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Plains affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Plains, its members, and its counsel made a monetary contribution to its preparation or submission.

including executory contracts, to purchasers on a shortened time frame with the goal of maximizing the value of the assets and maximizing the return to creditors. Purchasers rely on the protections afforded by the Bankruptcy Code—including the salient bankruptcy requirement of a debtor to disclose all of its assets and liabilities—when they agree to purchase assets after a truncated due diligence period. Obviating the full and complete disclosure requirements of the Bankruptcy Code while denying an assignee's right to challenge unenforceable contract provisions under state law contradicts established bankruptcy law while leaving purchasers liable for unknown and potentially outrageous damages.

Because the assumption and assignment of an executory contract through a Chapter 11 plan only implicates the rights of the debtor, counterparty and the potential assignee, it is manifestly unjust to hold the assignee liable for an oppressive contractual provision where the debtor and counterparty knew of the contract's existence prior to the bankruptcy but failed to disclose it. The supposed loss in confidence in failing to enforce a term of a Chapter 11 plan which impacts no creditors pales in comparison to the public's complete lack of assurance that the debtor will fully disclose or that the rights of all parties involved in the bankruptcy process will remain protected. At best, the Texas Supreme Court's decision will cause potential purchasers to slow the sale process by requiring additional due diligence at the expense of the bankruptcy estate; at worst it invites fraud or carelessness into a process formulated to stifle it.

STATEMENT OF THE CASE

Plains adopts Petitioner's statement of the case.

ARGUMENT

I. STATE LAW PROTECTIONS DO NOT APPLY TO ASSIGNEES OF CONTRACTS ASSUMED AND ASSIGNED PURSUANT TO CHAPTER 11 PLANS.

Outside of bankruptcy, state law provides protections to the purchaser in a sales transaction. Under Texas law, the assignment of the Exchange Agreement outside of bankruptcy without disclosure of the indemnity would not transfer the indemnity to Noble. Applicable state law applies fair notice requirements to the assignment of indemnification agreements that indemnify a party for its own negligence. *Littlefield v. Schaefer*, 955 S.W.2d 272, 274 (Tex. 1997); *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). The Supreme Court of Texas, however, looked to bankruptcy law in its decision in the instant case.

Without the protections of state law, the disclosure requirements under the Bankruptcy Code are absolutely critical with respect to purchase and sale transactions within bankruptcy as there are no other safeguards in the Bankruptcy Code or the Bankruptcy Rules that protect purchasers. The effect of the Texas Supreme Court's ruling disregarding ordinary contract party protections is to bind oil and gas purchasers in Texas bankruptcy sales with undisclosed, perpetual liabilities contrary to state law. Absent the assurance that they will not be burdened with undisclosed liabilities, prospective buyers and assignees will certainly account for this nearly unquantifiable risk, not present outside of bankruptcy, when determining whether to bid on assets in a bankruptcy. Considering that Texas, and in particular Houston, has become a hotbed for oil and gas bankruptcies in the last few years, the ruling of the nationally influential Texas Supreme Court could be devastating to numerous oil and gas purchasers and the debtors seeking to reorganize. Even should the Texas Supreme Court's opinion prove to be a solitary outlier, its effect will be inconsistent with the constitutionally mandated national uniformity of bankruptcy laws.

II. IF STATE LAW DOES NOT GOVERN THE ENFORCEABILITY OF CONTRACTS ASSIGNED THROUGH BANKRUPTCY, COMPLETE DISCLOSURE AS A PREQUISITE OF ASSIGNMENT IS EVEN MORE CRITICAL

By excluding state law, the only remaining protection for buyers/assignees of executory contracts under the Bankruptcy Code is full and complete disclosure. While the Bankruptcy Code is replete with provisions that protect the debtor and/or the counterparty to an executory contract dealt with under Section 365, the Bankruptcy Code is silent as to the protections of the purchaser/assignee of a contract.

Section 365 operates primarily to facilitate the debtor's rehabilitation while still affording the counterparty to the contract the ability to protect its interests. *See NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 528 (1984). When a debtor rejects a contract, any outstanding prepetition defaults under the contract are converted into a prepetition unsecured claim, equal in priority of distribution with other general unsecured claims. *See* 11 U.S.C. §§ 365(g), 502(g). If, on the other hand, a debtor assumes a contract, Section 365(b) requires that any outstanding default under the contract be identified and the counterparty be given an opportunity to dispute any proposed cure amount upon notice and a hearing. *See* 11 U.S.C. § 365(b)(1)(C). The assuming debtor then provides for the cure of the contract. *See* 11 U.S.C. § 365(b)(1)(C). The parties whose rights are protected by the Bankruptcy Code are limited to the debtor and the contract counterparty—not an assignee of the assumed contract. Despite an assignee having no protections under Section 365, it is regular practice when structuring transactions involving a sale of substantially all of a debtor's assets for the purchaser to be responsible for funding cure payments associated with any assigned contracts. Arguably, by not requiring full disclosure of all contracts to be assigned and relying on broad, catch-all provisions for assignment, a purchaser becomes responsible for funding cure payments on contracts of which it has no knowledge.

Since the Bankruptcy Code and the Bankruptcy Rules do not shield prospective buyers from being left with an undisclosed, perpetual liability and state law protections do not apply, the <u>only</u> protection for the buyer is full and complete disclosure of obligations it is assuming. *In re Hamilton*, 306 B.R. 575, 585 (Bankr. W.D. Ky. 2004) ("Full disclosure is the cornerstone and capstone of any bankruptcy case and is necessary for the successful administration of a bankruptcy estate."). Had Alma complied with its disclosure requirements and included the Exchange Agreement on its Schedule G, Noble would have discovered the indemnity, and would not have accepted assignment of the Exchange Agreement.

A. The Duty to Disclose Belongs to the Debtor-in-Possession Who is a Fiduciary in Chapter 11

Under the former Bankruptcy Act, the principal corporate reorganization mechanism was Chapter X. The SEC played a central role in Chapter X and the appointment of an independent trustee was automatic except in very small cases. The Bankruptcy Code changed that in Chapter 11 by drastically reducing the role of the SEC and providing that the debtor would normally serve as debtor-in-possession.

Thus, when a debtor files a case to reorganize under Chapter 11, the debtor becomes a debtor-in-possession and takes on the fiduciary duties of a trustee. 11 U.S.C. §§ 1101, 1104-1108; *In re Southmark Corp.*, 163 F.3d 925, 931 (5th Cir. 1999) ("A *sine qua non* in restructuring the debtor-creditor relationship is the court's ability to police the fiduciaries, [including] debtors-in-possession . . ., who are responsible for managing the debtor's estate in the best interest of creditors."). As a result of Alma's fiduciary status, a buyer should have added confidence in its honesty and trustworthiness. *See, e.g.*, *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) ("Parties 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 light of the Texas Supreme Court's decision, it is on the disclosure made by a debtor-in-possession, acting in its fiduciary capacity, that a buyer must rely to avoid inadvertent assumption of liability. It is critical that the Court grant certiorari to clarify that such reliance is not misplaced—that an undisclosed liability may not be foisted upon an unsuspecting buyer by a catch-all, boilerplate provision in a plan.

B. The Texas Supreme Court's Decision to Place the Terms of the Plan Ahead of Disclosure Invites Fraud

The decision by the Texas Supreme Court that confidence that the plan will be interpreted and enforced in accordance with its terms as opposed to giving greater force to the debtor's duty to fully disclose creates an incentive for fraud. The Texas Supreme Court's decision creates a mechanism for any debtor wishing to transfer a liability, and at times a known oppressive liability, without notifying the purchaser.

In practice, disclosure of a contract is accomplished through the debtor's inclusion of the contract on Schedule G, titled "Executory Contracts and Unexpired Leases," and on a list affixed to its motion to assume and assign the contract. *See* FED. R. BANKR. P. 6006(a) (providing that a "proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by 9014"); FED. R. BANKR. P. 9014 (stating that relief "shall be requested by motion"). The assumption and assignment process is intentionally structured to require the assumption of the exact executory contracts that the debtor wishes to assume and assign prior to their assignment. *See Bonneville Power Admin v. Mirant Corp. (In re Mirant Corp.)*, 440 F.3d 238, 253 (5th Cir. 2006); 11 U.S.C. § 365(f)(2)(A). Typically, a schedule of contracts to be assumed, including the name of the counterparty, sufficient information to identify the specific contract and any proposed cure amount that the assignee agrees to, is attached to the motion requesting assumption as an exhibit in order to satisfy the requisite notice requirements. That list and the debtor's disclosures made on Schedule G are the <u>only</u> sources of information that prospective buyers are given under the Bankruptcy Code and Bankruptcy Rules.

The Bankruptcy Code and Bankruptcy Rules, however, do not require a motion to assume or assign an executory contract when assumed and assigned through a plan. *See* 11 U.S.C. § 1123(b)(2) ("[A] plan may—subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract . . . of the debtor not previously rejected."). And according to the Texas Supreme Court's ruling, a catch-all provision may be placed in the plan that effectively assumes and assigns all contracts not specifically rejected, including undisclosed contracts. Thus, because protections under state law do not apply, a buyer must somehow know to specifically reject a contract of which it is not aware in order to avoid being bound to contractual provisions it would not be bound by under state law. While Rule 6006 does not apply to confirming a plan under Section 1129, the spirit of the rule should inform the Court as to what level of disclosure is required. *See, e.g.*, *Century Indem. Co. v. NGC Settlement Trust (In re Nat'l Gypsum Co.)*, 208 F.3d

498, 512 (5th Cir. 2000) ("Notice as a procedural safeguard cannot expand or contract based solely upon the procedural choice of the debtor when the ramifications to the non-debtor party are no less severe.").

If the Texas Supreme Court's ruling is allowed to stand, debtors will be incentivized to bypass the requirements of Rule 6006 and simply include a catch-all provision in the plan that all executory contracts not expressly rejected are assumed and assigned. Under a reduced disclosure standard, debtors may cleverly avoid the requirements of a motion to assume and assign a sale damaging executory contract and blindside the unsuspecting purchaser. The debtor will be off the hook and the counterparty exchanges the insolvent debtor for a different (presumably solvent) entity. The scheme is even that much more inequitable if the counterparty, like Conoco, knew of the existence of the contract and the costs associated with the indemnity but hid behind the debtor's failure to disclose. Accordingly, the Texas Supreme Court has opened the flood gates for fraud, carelessness, and other types of malfeasance to occur, and this Court should grant certiorari to rectify the problem.

C. Buyers Have No Choice but to Rely on the Debtor's Disclosures

Sale of a Chapter 11 debtor's business as a going concern under Section 363 of the Bankruptcy Code is increasingly common. Placing the burden solely on the prospective purchaser to uncover undisclosed executory contracts is not practical under that process. Due to the speed at which bankruptcy sales occur, prospective buyers are typically not provided a traditional due diligence period to analyze the debtor's assets, liabilities and executory contracts. As one commentator noted:

> In bankruptcy, acquisition due diligence is typically constrained by the relatively tight timeframe of the 363-sale process. As such, potential outside purchasers have to decide on the basis of imperfect information whether to submit a bid at all - and if so, how much to bid.

Jacob A. Kling: *Rethinking 363 Sales*, 17 STAN. J.L. BUS. & FIN. 258 (2012).

The timeframe to conduct due diligence is limited by the operating funds of the debtor and whether the debtor can survive during the pendency of the sale. *See In re Kidron Inc.*, 278 B.R. 626 (Bankr. M.D. Fla. 2002) (due diligence was limited by the debtor's lack of operating funds and compressed timeframe). Landmark examples of expeditious sales are General Motors and Chrysler, each of which involved a § 363 sale of substantially all assets that was completed in approximately 41 days. *See, e.g.*, *In re Gen. Motors*, 407 B.R. 463, 491-92 (Bankr. S.D.N.Y. 2009), aff'd sub nom. *In re Motors Liquidation Co.*, 430 B.R. 65 (S.D.N.Y. 2010); *In re Chrysler*, 405 B.R. 84, 96 (Bankr. S.D.N.Y. 2009). An example of another expedited sale is Lehman Brothers. *See In re Lehman Bros. Holdings*, Case No. 08-13555 (Bankr. S.D.N.Y. 2008) (sale approved within seven days of Chapter 11 filing). But expedited sales are not limited to outliers; there are numerous examples in which the sale order is entered in less than 60 days from the date of the petition. *See, e.g.*, *In re Loehmann's Holdings Inc., et al.*, Case No. 13-14050, [ECF Docket No. 200] (Bankr. S.D.N.Y. Jan. 7, 2014) (sale order entered 23 days from petition date); *In re Dots*, Case No. 14-11016, [ECF Docket No. 132] (Bankr. D. N.J. Feb. 27, 2014) (sale order entered 38 days from petition date); *In re Love Culture*, Case No. 14-24508, [ECF Docket No.157] (Bankr. D. N.J. Aug. 7, 2014) (sale order entered 21 days from petition date); *In re RadioShack, et al.*, Case No. 15-10197, [ECF Docket No. 1672] (Bankr. D. Del. April 1, 2015) (sale order entered 55 days from petition date); *In re Coldwater Creek*, Case No. 14-10867, [ECF Docket No. 439] (Bankr. D. Del. May 22, 2014) (sale order entered 41 days from petition date).

Faced with tremendous pressure to conduct due diligence in an expedited manner, prospective purchasers have no choice but to rely on the debtor's disclosures. The current system is therefore built upon the following assumptions: (i) that prices are generally reduced; (ii) that due diligence is done quickly; (iii) that potential bidders obtain comfort by knowing that debtors have a duty to disclose; and (iv) that the duty to disclose is enforced by bankruptcy courts.

If prospective purchasers were no longer able to rely on the debtor's disclosures, the time and cost of independently verifying all of the debtor's information would chill the market of potential buyers. The likely result from a loss of confidence in the bankruptcy sale system will be either an abstention from the system, a drastically reduced pricing model to account for the increased risk, or a demand for increased time for due diligence. The delay in completing due diligence would serve as the death knell to many financially strapped debtors that are relying on rapid sales to generate cash or maintain the value of their assets.

D. Buyers Have no Remedy Against a Debtor that Does Not Survive Post-Confirmation

Under the Texas Supreme Court's decision, if a debtor's plan is not a reorganization plan but instead a liquidating plan, as is often the case where a sale of the business occurs, the estate's assets remaining after a sale typically vest in a "liquidating trust" (or sometimes another liquidating entity). This entity completes the liquidation of assets, pursues avoidance and other actions, reviews and resolves claims, and makes distributions to creditors. After a period of time, the liquidating trust exhausts available assets, completes distributions to creditors and moves for the entry of a final decree, thereby closing the case.

Under such a scenario, the debtor no longer survives post-confirmation. There is no valuable entity to sue and certainly no entity against which to collect an award for monetary damages arising from a failure to disclose. In such a case, the unsuspecting purchaser may be forever stuck with a perpetual, undisclosed liability, with no recourse against the very entity that failed to disclose the liability.

III. ENFORCEMENT OF AN ASSUMED IF NOT REJECTED CATCH-ALL PROVISIONS IS NOT NECESSARY

The Texas Supreme Court's rationale that the confidence in the finality and enforcement of the plan outweighs the debtor's disclosure requirements is inequitable when considering the parties involved. Unlike other areas of the plan that affect classes of creditors, the assignment of executory contracts only impacts the (i) debtor; (ii) assignee; and (iii) counterparty to the contract.

If the nondisclosing debtor remains bound to the contract post-confirmation via the "ride-through" doctrine referenced by the Petitioner, the debtor will be no better or worse off than it was prepetition. *Stumpf v. McGee (In re O'Connor)*, 258 F.3d 392, 404 (5th Cir. 2001); *see also* 3 ALAN N. RESNICK & HENRY J. SOMMER, EDS., COLLIER ON BANKRUPTCY P 365.04[2][d] (15th ed. Rev. 2007). That is because the executory contract will "'ride through' the proceedings and be binding on the debtor even after a discharge is granted." *In re Nat'l Gypsum*, 208 F.3d at 504 n.4. Under this scenario, the only parties that would be affected by the debtor's failure to disclose the executory contract would be the debtor and the counterparty.

The question then becomes, who should bear the risk of the debtor's failure to disclose: the unsuspecting purchaser (as the majority of the Texas Supreme Court held), the reorganized debtor or (if the debtor does not survive) the counterparty to the contract? In this case, Conoco should suffer the damages from the environmental claims because it knew about, and enforced, the indemnity provision in the Exchange Agreement. Conoco and Alma swapped oil and gas interests pursuant to the Exchange Agreement almost five years prior Alma's bankruptcy filing. Noble, on the other hand, had no notice of the Exchange Agreement (or the indemnity provision) due to Alma's failure to disclose. Under these facts, the decision to hold a purchaser, like Noble, liable for an undisclosed, perpetual liability as opposed to the debtor or counterparty is manifestly unjust.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO LEND CLARITY TO A DEBTOR'S DUTY TO DISCLOSE

The Texas Supreme Court's decision has opened the door for fraud and other types of malfeasance to occur. Debtors will now be incentivized to play fast and loose with their schedules and to hide executory contracts that have high-risk potential in the hope that the speed with which sales in bankruptcy occur will provide an opportunity to transfer undisclosed potential liability to an unsuspecting buyer. Unable to rely on the debtor's requirement to fully disclose, any buyer will be required to expend time and money to verify the completeness of the debtor's disclosures in its schedules, statement of financial affairs, and disclosure statement. This added burden on a buyer will lower any potential bid and result in a lower return to creditors.

The market for bankruptcy assets will undoubtedly be affected by the Texas Supreme Court's decision. Purchasing bankruptcy assets under that decision includes the risk of unwittingly assuming an undisclosed liability, and this risk requires prospective purchasers to calculate that unknown risk and to discount significantly the purchase price. The end result will, at a minimum, chill asset sales, delay administration of the estates and decrease distributions to creditors.

CONCLUSION

For the foregoing reasons, and those stated by Petitioner, Noble's petition for certiorari should be granted and the decision of the Supreme Court of Texas ultimately reversed.

Respectfully submitted,

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