

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: : Case No. 16-32760 (MI)
:
WARREN RESOURCES, INC., *et al.*,¹ : Chapter 11
:
Debtors. : Jointly Administered
:

**MOTION OF LUCAS R. NARDINI, INDIVIDUALLY AND AS TRUSTEE OF
THE MARY F. NARDINI ADMINISTRATIVE TRUST U/A SIX,
AND ROY E. PREVOST FOR AN ORDER DETERMINING THAT
(i) PENNSYLVANIA OIL AND GAS LEASES WERE NOT ASSUMED UNDER
THE DEBTORS' PLAN, AND (ii) THE DISCHARGE PROVISIONS OF
THE DEBTORS' PLAN DO NOT PRECLUDE THE FILING OF A
DECLARATORY JUDGMENT ACTION, AN ACTION IN EJECTMENT OR A QUIET
TITLE ACTION IN PENNSYLVANIA**

**A HEARING WILL BE CONDUCTED ON THIS MATTER
ON NOVEMBER 29, 2016 AT 10:00 a.m., IN COURTROOM
404, 4th FLOOR, UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, 515 RUSK
AVENUE, HOUSTON, TEXAS 77002.**

**THIS MOTION SEEKS AN ORDER THAT MAY
ADVERSELY AFFECT YOU. IF YOU OPPOSE THE
MOTION, YOU SHOULD IMMEDIATELY CONTACT THE
MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU
AND THE MOVING PARTY CANNOT AGREE, YOU MUST
FILE A RESPONSE AND SEND A COPY TO THE MOVING
PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE
WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON
YOU. YOUR RESPONSE MUST STATE WHY THE
MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT
FILE A TIMELY RESPONSE, THE RELIEF MAY BE
GRANTED WITHOUT FURTHER NOTICE TO YOU. IF
YOU OPPOSE THE MOTION AND HAVE NOT REACHED
AN AGREEMENT, YOU MUST ATTEND THE HEARING.**

¹ Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: (i) Warren Resources, Inc. (4080); (ii) Warren E&P, Inc. (4052); (iii) Warren Resources of California, Inc. (0072); (iv) Warren Marcellus, LLC (0150); (v) Warren Energy Services, LLC (4748); and (vi) Warren Management Corp. The Debtors' service address is: 11 Greenway Plaza, Suite 3050, Houston, Texas 77046.

UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AD MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEYS.

Lucas R. Nardini (“Nardini”), individually and as Trustee of the Mary F. Nardini Administrative Trust U/A Six (the “Nardini Trust”), and Roy E. Prevost (“Prevost,” and together with Nardini and the Nardini Trust, the “Lessors”), by and through their undersigned counsel, by way of Motion for an Order Determining That (i) Pennsylvania Oil and Gas Leases Were Not Assumed Under the Debtors’ Plan, and (ii) the Discharge Provisions of the Debtors’ Plan Do Not Preclude the Filing of a Declaratory Judgment Action, an Action in Ejectment or Quiet Title Action in Pennsylvania (the “Motion”), hereby states:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the Southern District of Texas (the “Bankruptcy Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and paragraph 45 of the Confirmation Order (as defined herein).
2. Venue is proper pursuant to 28 U.S.C. § 1408.
3. The statutory basis for the relief requested herein is section 105(a) of title 11 of the United States Code (the “Bankruptcy Code”).

PRELIMINARY STATEMENT

4. This motion is filed in deference to the U.S. Bankruptcy Court, and out of an abundance of caution, to obtain approval of the Bankruptcy Court prior to Lessors filing their legal actions in Pennsylvania state court. Based on the Confirmation Order previously entered in the above-referenced proceeding, the bankruptcy of Warren Resources, Inc., *et al.* does not preclude

Lessors from initiating their legal claims in Pennsylvania, to obtain declaratory relief and quiet title to their property in Pennsylvania.

5. The Confirmation Order entered by this Court on September 14, 2016 (Doc. No. 342) underscored that the Lessors' and Debtors' property rights are not affected by the Plan of Reorganization. The Court declared: "[N]othing in the Plan alter[s] or changes the underlying property rights associated with the Debtors' Oil and Gas Leases, including the underlying property rights of working interest and royalty interest holders." (Doc. No. 342, Confirmation Order, ¶ 8).

6. Based upon the failure of Debtors and/or Debtors' predecessors in interest failure to comply with the "one well per 160-acre" density requirement, the Pennsylvania Leases have terminated and all rights under the Leases have reverted to Lessors. The Pennsylvania actions will adjudicate title to Lessors' property in Pennsylvania under Pennsylvania law.

BACKGROUND

A. The Debtors' Plan

7. On June 2, 2016 (the "Petition Date"), Warren Resources, Inc. and its affiliated debtor entities (the "Debtors"), each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court.

8. After the Petition Date, the Debtors continued to operate and manage their businesses as debtors-in-possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

9. On June 16, 2016, the Debtors filed their Disclosure Statement to Accompany Plan of Reorganization of Warren Resources, Inc. and its Affiliated Debtors [Docket No. 96] (the "Disclosure Statement") and Plan of Reorganization of Warren Resources, Inc. and its Affiliated Debtors [Docket No. 97] (the "Plan").

10. On July 25, 2016, the Bankruptcy Court entered an Order approving the Disclosure Statement [Docket No. 236].

11. On September 14, 2016, the Bankruptcy Court entered an Order confirming the Plan [Docket No. 342] (the “Confirmation Order”).

12. Paragraph 8 of the Confirmation Order provides that the Debtors’ oil and gas leases (the “Oil and Gas Leases”) are assumed by the Debtors to the extent that the Oil and Gas Leases are “unexpired leases of non-residential real property” for the purposes of Section 365(d)(4).

13. Paragraph 8 further states that “[n]othing in this Confirmation Order shall be deemed a finding or determination that any Oil and Gas Leases constitute ‘unexpired leases of non-residential real property’ for purposes of Section 365(d)(4).”

14. Paragraph 8 of the Confirmation Order makes it clear that “[n]othing in the Plan alters or changes the underlying property rights associated with the Debtors’ Oil and Gas Leases.”

15. The Confirmation Order provides that the automatic stay terminates on the Effective Date of the Plan. Confirmation Order ¶ 24.

16. On October 5, 2016, the Debtors issued a Notice of Occurrence of Effective Date of Plan of Reorganization of Warren Resources, Inc. and its Affiliated Debtors [Docket No. 358].

B. The Nardini and Prevost Oil and Gas Leases

17. On or about February 16, 2008, the Estate of Mary F. Nardini, deceased, as lessor, entered into an Oil and Gas Lease with Magnum Land Services, LLC, as lessee (the “Nardini Lease”).

18. The Nardini Lease covers the property located at 65 Mountain Road, Tunkhannock, Pennsylvania 18657 (the “Nardini Premises”). A copy of the Nardini Lease is attached hereto as Exhibit “A.”

19. The Nardini Lease was recorded in Wyoming County, Pennsylvania, under instrument no. 2008-1479.

20. Nardini and the Nardini Trust are the current holders of the lessor's interest under the Nardini Lease.

21. Warren Resources, Inc., Warren Marcellus, LLC and/or Warren E&P, Inc., are the current holders of the lessee's interest under the Nardini Lease.

22. On or about January 2, 2008, Prevost, as lessee, entered into an Oil and Gas Lease with Magnum Land Service, as lessee (the "Prevost Lease," and together with the Nardini Lease, the "Leases"). A copy of the Prevost Lease is attached hereto as Exhibit "B."

23. The Prevost Lease covers 416.112 acres in Wyoming County, Pennsylvania (the "Prevost Premises," and together with the Nardini Premises, the "Leased Premises").

24. The Prevost Lease was recorded in Wyoming County, Pennsylvania, under instrument no. 2008-0643.

25. Warren Resources, Inc., Warren Marcellus, LLC and/or Warren E&P, Inc., are the current holders of the lessee's interest under the Prevost Lease.

26. The Leases provide that they shall continue in full force and effect and "so much longer thereafter as oil, gas, and/or coalbed methane gas or their constituents are produced or capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil, gas, and/or coalbed methane gas" Leases, ¶ 2.

27. Paragraph 8 of the Leases provides, in pertinent part, as follows:

Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or strata therein with other lands to form a oil, gas and/or coalbed methane gas development unit of not more than 640 acres, or such larger unit as

may be required by state law or regulation for the purpose of drilling a well thereon and Lessee shall be required to maintain a well density of at least 1 well per 160 acres contained in such unit.

28. Pursuant to Paragraph 8 of the Leases,² a significant portion of the Nardini Premises has been unitized into two producing units, the Nardini Unit and the Prevost Unit.

29. In accordance with Paragraph 8 of the Leases, a significant portion of the Prevost Premises has been unitized into five producing units, including the Keystone Unit, the Macialek Unit, the Mattocks Unit, the Nardini Unit and the Prevost Unit.

30. None of these units meet the one well per 160-acre well density requirement contained in Paragraph 8 of the Leases. The Keystone Unit has only one well and is comprised of 240.33 acres. The Macialek Unit has only one well and is comprised of 294.45 acres. The Mattocks Unit has only one well is comprised of 320 acres. The Nardini Unit has only one well and is comprised of 309.51 total acres. The Prevost Unit has only one well and is comprised of 259.18 acres.

31. Public records, including Pennsylvania DEP Well Production Data and well drilling permits filed by the Debtors, or their predecessors-in-interest, as to these units show that no additional wells are active or have been drilled in such units.

32. As a result of the Debtors' breach of the well spacing requirements of the Leases, any right, title, or interest held by the Debtors under the Leases and/or the leased premises reverted to the Lessors. *See Neuhard v. Range Resources-Appalachia, LLC*, 29 F. Supp. 3d 461, 479 (M.D. Pa. 2014).

² Unitization ensures that an entire oil and gas field may be operated as a single entity, without regard to surface boundaries, which permits the underlying oil and gas resources to be developed efficiently and cost-effectively. *Entek GRB, LLC v. Stull Ranches, LLC*, 763 F.3d 1252, 1256 (10th Cir. 2014).

RELIEF REQUESTED

33. By this motion, Lessors request an order (i) determining that the Leases do not constitute nonresidential leases of real property for the purposes of Section 362(d)(4) of the Bankruptcy Code and, therefore, were not assumed by the Debtors; (ii) the discharge provisions of the Plan do not preclude the Lessors from pursuing an action in Pennsylvania seeking a determination that they hold free and clear title to the Premises; and (iii) for such other and further relief as the Court deems just and equitable.

ARGUMENT

Under Pennsylvania Law, the Leases Are Not Unexpired Leases of Nonresidential Real Property for the Purposes of Section 365(d)(4).

34. The Leases were not assumed by the Debtors pursuant to the Confirmation Order because the Leases do not constitute “unexpired lease[s] of nonresidential real property” for the purposes of Section 365(d)(4) of the Bankruptcy Code.

35. “Pennsylvania law recognizes oil and gas leases as something other than conventional leases.” *Sabella v. Appalachian Dev. Corp.*, 103 A.3d 83, 103 (Pa. Super. 2014).

36. Pennsylvania “law has evolved to unequivocally establish that rights to oil and gas are to be treated as transfers of estates in property and not leaseholds.” *Nolt v. TS Calkins & Assocs., LP*, 96 A.3d 1042, 1047 n.3 (Pa. Super. 2014).

37. “Typically . . . the habendum clause in an oil and gas lease provides that a lease will remain in effect for as long as oil or gas is produced in ‘paying quantities.’” *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 268 (Pa. 2012).

38. Where such a habendum clause exists, if “oil and gas is produced, a fee simple determinable is created in the lessee.” *Id.* at 267. *See also Brown v. Haight*, 255 A.2d 508, 511 (Pa. 1969) (finding fee simple determinable interest created by habendum clause providing that

term was “twenty years from the date hereof, and as much longer as the said premises are being drilled or operated for the production of oil or gas, or as oil or gas is found or produced in paying quantities thereon”); *Sabella*, 103 A.3d at 103 (“[A]n oil and gas lease, upon vestiture arising from successful discovery and production of oil, conveys a potential indefinite fee simple determinable.”).

39. “Such a fee is a fee simple, because it may last forever in the grantee and his heirs and assigns.” *Jedlicka*, 42 A.3d at 267.

40. By contrast, “[a] conventional lessor by definition does not convey to a lessee ‘rights or privileges of a permanent nature.’” *Sabella*, 103 A.3d at 103 (citation omitted).

41. The habendum clauses in the Leases convey potentially permanent rights and privileges in the Debtor. The Leases provide that they shall continue in full force and effect and “so much longer thereafter as oil, gas, and/or coalbed methane gas or their constituents are produced or capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by the Lessee in the search for oil, gas, and/or coalbed methane gas” Leases, ¶ 2.

42. Consequently, under Pennsylvania law, the Leases created fee simple determinable interests that were subject to reversion upon the Debtors’ breach of the well density requirements of the Leases.

43. “[O]il and gas leases considered to be freehold estates by the governing state law do not constitute ‘unexpired leases’ under the Bankruptcy Code and therefore Section 365 does not govern their assumption or rejection.” *River Prod. Co. v. Webb (In re Topco, Inc.)*, 894 F.2d 727, 739 n.17 (5th Cir. 1990). *See also K & D Energy v. KY USA Energy, Inc. (In re KY USA Energy, Inc.)*, 444 B.R. 734, 737 (Bankr. W.D. Ky. 2011) (“It is well settled by many courts that

an oil and gas lease is not an executory contract because the rights conveyed are an interest in real estate and not truly a lease.”); *In re Hanson Oil Co., Inc.*, 97 B.R. 468, 469-70 (Bankr. S.D. Ill. 1989) (holding oil and gas lease did not constitute “unexpired lease” within meaning of Section 365 (d)(4) because an oil and gas lease conveyed a freehold estate under Illinois state law).

44. Since the Leases created fee simple determinable interests, they do not constitute unexpired leases of real property and are not subject to assumption under Section 365 of the Bankruptcy Code and the Confirmation Order.

45. Consequently, the Leases were not assumed by the Debtors.

The Discharge Provisions of the Plan Do Not Preclude the Lessors from Pursuing an Action in Pennsylvania Seeking a Declaration That the Lessors Hold Free and Clear Title to the Premises.

46. The Lessors intend to pursue an action in Pennsylvania requesting a declaration that the Debtors’ fee simple determinable interest reverted as a result of the Debtors’ breach of the well spacing requirements of the Leases and that the Lessors possess free and clear title to the Premises.³ Although the Confirmation Order makes it clear that the Lessors’ and the Debtors’ property rights under the Leases are not affected by the Plan, out of an exercise of extreme caution, the Lessors request that this Court enter an order determining that the discharge provisions of the Plan do not preclude the Lessors from filing their planned action in Pennsylvania.

47. As noted above, Paragraph 8 of the Court’s Confirmation Order specifically provided that “[n]othing in the Plan alter[s] or changes the underlying property rights associated

³ Under Pennsylvania law, a lessee may file an action to quiet title or for a judgment declaring that an oil and gas lease terminated. *See Fisher v. Powell*, No. 1689 WDA 2014, 2015 Pa. Super. Unpub. LEXIS 2029, at *1 (Pa. Super. July 7, 2015) (quiet title action); *Norm’s Ltd. v. Atlas Noble, LLC*, No. 1377 WDA 2014, 2015 Pa. Super. Unpub. LEXIS 1286, at *5 (Pa. Super. May 8, 2015) (declaratory judgment).

with the Debtors' Oil and Gas Leases, including the underlying property rights of working interest and royalty interest holders.”

48. Pursuant to Paragraph 8 of the Confirmation Order, the Debtors' property rights under the Leases remain exactly what they were prior to Plan confirmation - fee simple determinable interests in real property that, under Pennsylvania law, automatically reverted to the Lessors due to the Debtors' breach of the well-spacing provisions.

49. Accordingly, the Lessors are not precluded from proceeding with a declaratory judgment action, an ejectment action or a quiet title action in Pennsylvania.

The Discharge Order Does Not Preclude Lessors from Bringing an *In Rem* Action in Pennsylvania.

50. Even if the Confirmation Order did not specifically provide that the Lessors' and Debtors' property rights under the Leases are not altered or changed by the Plan, the discharge injunction still would not bar the Lessors from pursuing an *in rem* action in Pennsylvania seeking a determination that they hold free and clear title to the Premises.

51. It is well-established that “a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*.” *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991). *See also In re Tucker*, 391 B.R. 404, 409 (Bankr. S.D. Tex. 2008). This is because “[t]he discharge order discharges debts. It does not shield debtors from *in rem* actions brought to determine the status of property. . . .” *Gleason v. GVL Lake Props., LLC (In re Gleason)*, 510 B.R. 114, 116 (Bankr. E.D. Ky. 2014); *see also Martinez v. Olague (In re Martinez)*, No. CC-11-1099-DKiPa, 2011 Bankr. LEXIS 4833, at *16 (B.A.P. 9th Cir. Oct. 11, 2011) (holding discharge injunction did not bar action by creditor who “simply wishes to assert his interest in the real property” transferred to the debtor); *Bank One Wisconsin v. Annen (In re Annen)*, 246 B.R. 337,

340 (B.A.P. 8th Cir. 2000) (“As is evident from the plain language of the statute, the discharge injunction applies to *in personam* actions. It does not apply to *in rem* actions.”); *In re Harris*, No. 08-31056-HJB, 2016 Bankr. LEXIS 2287, at *25 (Bankr. D. Mass. May 26, 2016) (quiet title action by holder of note to compel assignment of mortgage not subject to discharge injunction because it was an *in rem* proceeding); *Oglesby v. Sunrise Coop., Inc. (In re Oglesby)*, Adv. No. 13-3178, 2014 Bankr. LEXIS 4104, at *8 (Bankr. N.D. Ohio Sept. 26, 2014) (*in rem* rights “survive” post discharge); *Wofford v. Scott (In re Scott)*, 347 B.R. 917, 919-20 (M.D. Fla. 2006) (noting that the discharge injunction applies to *in personam* actions but not *in rem* actions to enforce interests in property); *In re Dabrowski*, 257 B.R. 394, 398 (Bankr. S.D.N.Y. 2001) (discharge does not preclude lessor’s action in nature of ejection).

52. As set forth above, under Pennsylvania law, oil and gas leases create fee simple determinable interests in property. An action addressing parties’ respective property interests pursuant to a fee simple determinable is an *in rem* proceeding. *See N.C. Tech. Dev. Auth., Inc. v. North Carolina (In re N.C. Tech Dev. Auth., Inc.)*, Adv. No. 05-9004, 2005 Bankr. LEXIS 1087, at *6-7 (Bankr. M.D.N.C. Mar. 30, 2005) (finding that an action adjudicating the parties’ property interests under a deed creating a fee simple determinable was in the nature of an *in rem* action). Furthermore, quiet title actions are considered *in rem* proceedings under Pennsylvania law. *See Stefanick v. Minucci*, 333 A.2d 920, 922 (Pa. 1975) (distinguishing an *in personam* action to compel sale of property from an *in rem* action to quiet title); *see also Signal Consumer Discount Co. v. Babuscio*, 390 A.2d 266, 270 n.9 (Pa. Super. Ct. 1978) (noting *in rem* nature of quiet title action).

53. The Lessors do not plan to bring an *in personam* action against Debtors for a money judgment seeking payment of a pre-petition debt. Rather, the Lessors intend to pursue an *in rem*

action to adjudicate the parties' respective property rights in the fee interest created under the Leases. Because of this distinction between an *in personam* action and an *in rem* action, the discharge injunction does not prevent Lessors from exercising their Pennsylvania state law rights and seeking a declaration that they own free and clear title to the Premises. However, out of an abundance of caution, the Lessors request that the Court issue an order expressly determining that the Lessors are not prohibited by the discharge injunction from filing a declaratory judgment action or quiet title action in Pennsylvania.do so.

CONCLUSION

For the foregoing reasons, the Lessors respectfully request that the Court enter an order (i) determining that the Leases are not nonresidential leases of real property for the purposes of Section 362(d)(4) of the Bankruptcy Code and, therefore, were not assumed by the Debtors; (ii) the discharge provisions of the Plan do not preclude the Lessors from pursuing an action in Pennsylvania seeking a determination that they hold free and clear title to the Premises; and (iii) for such other and further relief as the Court deems just and equitable.

Dated: November 4, 2016

Respectfully submitted,

/s/ Paul D. Clote

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 4, 2016, the foregoing document was served by ECF on the parties registered to receive electronic notices.

By: /s/ Paul D. Clote
Paul D. Clote