

**RECEIVER’S SUPPLEMENTAL BRIEF IN SUPPORT OF
RECEIVER’S MOTION FOR AUTHORITY TO ABANDON INTERESTS
IN OIL AND GAS PROPERTIES [ECF NO. 296]**

Deborah D. Williamson, in her capacity as the Court-appointed Receiver (the “Receiver”) for the Receivership Parties (as defined in the Court’s *Order Appointing Receiver* [ECF No. 17] (the “Receivership Order”))¹ and the receivership estates (collectively, the “Receivership Estates”) in the above-captioned case (the “Case”), hereby files this *Receiver’s Supplemental Brief in Support of Receiver’s Motion for Authority to Abandon Interests in Oil and Gas Properties* [ECF No. 296] (the “Receiver’s Brief”) pursuant to the Court’s May 4, 2023 oral order and in support of the *Receiver’s Motion for Authority to Abandon Interests in Oil and Gas Properties* [ECF No. 296] (the “Oil and Gas Abandonment Motion”). In support of the Receiver’s Brief, the Receiver respectfully represents as follows:

RECEIVER’S BRIEF

1. The Receiver’s Brief is filed in accordance with the Court’s May 4, 2023 oral order. As stated in the Oil and Gas Abandonment Motion, there is no case law authority from the Fifth Circuit Court of Appeals or the Supreme Court of the United States that addresses the standard of review with respect to a receiver’s request to abandon any property—much less oil and gas properties. Moreover, there is no case law authority that the Receiver can locate to provide to the Court that is directly on point with the facts and issues presented in this Case—this is a case of first impression. Nevertheless, the Receiver’s Brief is filed to distinguish the case law cited by the Railroad Commission of Texas (the “RRC”), through the Office of the Texas Attorney General. Importantly, unlike the RRC’s case law support, the Oil and Gas Abandonment Motion requests Court authority to abandon—not operate in contravention of any state law or

¹ Capitalized terms used but not otherwise defined herein shall have the meaning ascribed in the Receivership Order or the *Declaration of Deborah D. Williamson, Receiver for Hearing on May 4, 2023 at 1:30 P.M. Central*.

regulation—any Oil and Gas Properties, is not a request to avoid any environmental remediation obligation of the Operators that arose prior to abandonment (other than P&A obligations), and does not seek any relief from or against the RRC.

PROCEDURAL BACKGROUND

Oil and Gas Abandonment Motion

2. The Receiver filed the Oil and Gas Abandonment Motion on December 16, 2022.

3. The RRC filed the *Railroad Commission of Texas’s Unopposed Motion for Leave to File a Brief Supplemental Amicus Curiae in Opposition to Receiver’s Motion to Abandon Interests in Oil and Gas Properties* [ECF No. 351] on April 20, 2023, which the Court granted in its May 2, 2023 *Order* [ECF No. 358].

4. On May 1, 2023, the Receiver and the RRC filed the *Joint Status Report Filed Pursuant to February 14, 2023 Order [ECF No. 333]* [ECF No. 357], which, among other things, detailed the issues before the Court with respect to the Oil and Gas Abandonment Motion.

5. On May 2, 2023, the Clerk’s Office of the United States District Court for the Northern District of Texas, Fort Worth Division filed on the docket the *Railroad Commission of Texas’s Brief Supplemental Amicus Curiae in Opposition to Receiver’s Motion to Abandon Interests in Oil and Gas Properties* [ECF No. 359] (the “RRC Brief”).

6. On May 4, 2023, the Court considered the Oil and Gas Abandonment Motion, arguments of the Receiver’s counsel and the RRC, admitted evidence of the Receiver, and took the Oil and Gas Abandonment Motion under advisement. The Court also orally ordered at the May 4, 2023 hearing (the “Hearing”) that any supplemental briefing of the Receiver and the RRC to the Oil and Gas Abandonment Motion be filed on or before May 22, 2023. The Receiver’s Brief is filed in accordance with the Court’s May 4, 2023 oral order.

7. On May 18, 2023, the Receiver obtained a copy of a *Final Order* from the RRC, dated May 17, 2023, which approved the transfer of nine (9) P-4s with respect to 14 wells to Erwin Operating and seven (7) P-4s with respect to 11 wells to SDMB Resources, LLC. The request to transfer fourteen (14) P-4s with respect to 168 wells of the Operators remains pending before the RRC and is not set for hearing until August 4, 2023.² As a result, the Receiver presently seeks authority to abandon up to 327 wells, in addition to any related leases.

8. The RRC does not dispute that this Court can authorize the Receiver's abandonment of the Oil and Gas Properties. Abandonment of the Oil and Gas Properties contains two components: (1) abandonment of the working interest in a lease, and (2) abandonment of the operator status with the RRC.

9. The RRC has not objected to the Receiver's abandonment of any working interest in any particular well or lease. However, the RRC's apparent position remains that this Court must require that abandonment of the right to operate any Oil and Gas Properties be subject to and conditioned upon full compliance with all rules, regulations, and related statutes and, thus, ultimately subject to the RRC's consent.

AUTHORITIES

RRC's Case Law Cited at Hearing is Distinguishable from Facts in This Case

I. *Gillis v. California* ("Gillis")³

10. At the Hearing, the RRC cited *Gillis* in support of its position as detailed in the RRC Brief. In *Gillis*, the Supreme Court of the United States held that a receiver could not continue a receivership party's operations without a bond or license, which would be in contravention of California laws regarding motor vehicle fuel distributor operations.

² It is unclear whether the transferee will seek the approval from the RRC for the transfer of all 168 wells.

³ 293 U.S. 62 (1934).

11. The RRC contends that *Gillis* stands for the proposition that the Receiver must abandon any Oil and Gas Properties in accordance with state law “regardless of the cost or burden.” RRC Brief, at p. 5. However, the receiver in *Gillis* wanted to continue to operate the company without a bond or license through the State of California in contravention of state law. Unlike *Gillis*, the Receiver does not desire to operate the Oil and Gas Properties going forward, hence her request for Court authority to abandon the Oil and Gas Properties.

II. *Midlantic National Bank v. New Jersey Department of Environmental Protection (“Midlantic”)*⁴

12. At the Hearing, the RRC cited *Midlantic* in support of its position as detailed in the RRC Brief. In fact, the Receiver distinguished *Midlantic* in her Oil and Gas Abandonment Motion. See Oil and Gas Abandonment Motion, at p. 15.

13. The Supreme Court addressed abandonment in the context of bankruptcy with respect to a Chapter 7 trustee in *Midlantic*. The Supreme Court held that the bankruptcy court did not have the authority to permit abandonment of hazardous property *without formulating conditions that will adequately protect the public’s health and safety*. *Midlantic*, 474 at 507 (emphasis added). In its holding, the Supreme Court relied on 28 U.S.C. § 959(b), which requires a trustee or receiver to “operate property in accordance with the valid laws of the state in which the property is situated, in the same manner that its owner . . . would be bound to do if in possession thereof.” 28 U.S.C. § 959(b).

14. Here, unlike the Chapter 7 trustee in *Midlantic*, the Receiver has continuously reported to the Court and to the RRC that all alleged environmental issues that have been identified since her appointment have been addressed. The Receiver, on behalf of the five (5) Receivership

⁴ 474 U.S. 494 (1986).

Party Operators,⁵ is not seeking to abandon any Oil and Gas Properties to avoid any obligation relating to alleged hazardous property and/or environmental issues previously identified. The Receiver, unlike the Chapter 7 trustee in *Midlantic*, has approved the expenditure of over \$85,000.00 (which number continues to increase) to remedy issues identified by the RRC relating to the various Operators' alleged environmental issues, most of which occurred prior to the date of her appointment. The Receiver has also stated that the limited assets available to the Operators will not be dissipated outside of operating the Oil and Gas Properties, including addressing any new environmental issues or claims of the RRC.

III. *Texas v. Lowe (In re H.L.S. Energy Co.) (“H.L.S. Energy”)*⁶

15. At the Hearing, the RRC also cited *H.L.S. Energy* in support of its position as detailed in the RRC Brief. Again, the Receiver distinguished *H.L.S. Energy* in her Oil and Gas Abandonment Motion from the facts in this Case. See Oil and Gas Abandonment Motion, at p. 15.

16. The Fifth Circuit considered, in the bankruptcy context, post-petition environmental obligations and determined that costs actually incurred by the RRC associated with plugging inactive wells were entitled to administrative expense priority under Title 11 of the United States Code (the “Bankruptcy Code”). The Receiver has not yet proposed a claims and disbursement process for consideration and approval by this Court. Any such claims and disbursement process is subject to this Court's approval. As such, the holding in *H.L.S. Energy* is wholly irrelevant to the Oil and Gas Abandonment Motion.

17. In *H.L.S. Energy*, the debtor, H.L.S. Energy Co., initially filed its petition under chapter 11, and a chapter 11 trustee was appointed. Subsequently, the case converted to one under

⁵ The five (5) Receivership Parties that possess a P-5 with the RRC include Dodson Prairie Oil & Gas LLC (“Dodson Prairie”), Panther City Energy, LLC (“Panther City”), ArcoOil Corp. (“ArcoOil”), Barron Petroleum LLC (“Barron”), and Leading Edge Energy, LLC (“Leading Edge”) (collectively, the “Operators”).

⁶ 151 F.3d 434 (5th Cir. 1998).

chapter 7 for liquidation, and a chapter 7 trustee (the appellant) was appointed. Prior to the appointment of the chapter 7 trustee, the RRC entered into an agreement with the chapter 11 trustee whereby the RRC would plug the debtor's oil and gas wells and charge the bankruptcy estate for plugging costs, given the debtor had insufficient funds for plugging.⁷ None of the wells at issue "had been inactive for more than one year prior to the bankruptcy."⁸

18. That is certainly not the facts in this Case—most of the inactive wells in this Case ceased production more than one year prior to the appointment of the Receiver. The RRC has not—and has not indicated it would be willing to do so—entered into any agreement with the Receiver whereby the RRC would incur the costs to plug any of the Operators' inactive wells. Furthermore, the RRC has not listed any of the Operators' inactive wells on its lists to be plugged using either federal or state funding.

19. There is no Fifth Circuit or Supreme Court authority that addresses the priority of payments in a receivership case, and there is no statutory authority enumerating priority of payments in a receivership case. As stated on the record at the Hearing, the Receiver would not object to the Court approving a claims and distribution process that would provide "priority" of payment of any claim of the RRC against a respective Operator.

IV. *Securities & Exchange Commission v. First Choice Management Services* ("First Choice")⁹

20. The RRC also cited *First Choice* in support of its position as detailed in the RRC Brief. As noted on the record at the Hearing, the facts in *First Choice* are wholly distinguishable.

21. In *First Choice*, the Seventh Circuit considered whether the district court properly denied a receiver's motion to hold the RRC in contempt for failing to return to the receiver a

⁷ 151 F.3d at 436.

⁸ *Id.*

⁹ 743 Fed. App'x 33 (7th Cir. 2018).

financial assurance bond, which potentially was paid with funds of defrauded investors. The Seventh Circuit found the district court did not abuse its discretion and affirmed.

22. The Securities and Exchange Commission filed the *First Choice* receivership case in 2000 in Indiana, alleging fraud in connection with acquisition of oil and gas assets located in Texas. For the next eighteen (18) years, the receiver litigated various aspects of the case, including issues relating to oil and gas assets and the RRC.

23. In *First Choice*, the RRC rendered two (2) judgments against a receivership party-operator in RRC enforcement proceedings. There, the RRC reported that it spent more than \$542,000.00 to plug various wells. Despite the fact that the RRC had expended more than the amount of the bond, the *First Choice* receiver sought turnover of the \$250,000.00 cash bond from the RRC, which was posted post-receivership by a receivership party. When the RRC refused to turn over the bond to the receiver, he unsuccessfully requested that the district court hold the RRC in contempt.

24. Here, unlike *First Choice*, the Receiver is not requesting—and has not requested—that the RRC turn over any of the cash deposits or third-party bonds of the Operators. To the contrary, the Receiver stated on the record at the Hearing that she does not object to the RRC calling in the two (2) third-party bonds of ArcoOil and Leading Edge, recognizing the Fifth Circuit’s precedent that allows for such. However, the Receiver does believe that the RRC would need authority by separate order of this Court, given the terms of the *Asset Freeze Order* [ECF No. 14], to “call in” the three (3) cash deposits of Dodson Prairie, Panther City, and Barron. The Receiver has stated that she would have no objection to such relief.

25. Additionally, unlike *First Choice*, the RRC has not rendered any judgments against the Operators, nor has it incurred any amounts with respect to plugging any wells of the Operators. The Receiver is not seeking to recover anything from the RRC.

26. The case law cited by the RRC in support of the RRC Brief is clearly distinguishable from the facts in this Case. Thus, this remains a case of first impression for the Court's consideration and ruling.

Additional Instructive Case Law

I. *In re National Gypsum Company* (“NGC”)¹⁰

27. In *NGC*, the United States District Court for the Northern District of Texas considered, among other things, whether environmental costs incurred post-petition as a result of the debtors' pre-petition conduct was entitled to administrative priority under the Bankruptcy Code. The *NGC* court noted that *Midlantic* restricted the ability to abandon property where abandonment would result in “imminent and identifiable harm” to public health and safety.¹¹ Thus, the *NGC* court held that only the environmental liability costs which “were necessitated by conditions that posed an imminent and identifiable harm to the environment and public health” were entitled to administrative priority under the Bankruptcy Code.¹²

28. While the facts in this Case are distinguishable from *NGC*, it may be relevant in that the court interpreted *Midlantic* to limit abandonment under the Bankruptcy Code to those situations where there was an “imminent and identifiable harm” to the environment and public health.

¹⁰ 139 B.R. 397 (N.D. Tex. 1992).

¹¹ *Id.* at 413.

¹² *Id.*

II. *In re Howard* (“Howard”)¹³

29. In *Howard*, the United States Bankruptcy Court for the Southern District of Mississippi considered a chapter 13 trustee’s request to abandon real property, which was of inconsequential value and benefit to the bankruptcy estate and purportedly contained environmental contamination that arose at least a decade prior.¹⁴ Notably, the *Howard* court found “it is reasonable to conclude that [Mississippi Department of Environmental Quality’s] inaction as to the [real property] for nearly a decade indicates that the property’s condition does not pose an imminent threat to the public health and safety.”¹⁵ The *Howard* court provided a detailed analysis of decisions which addressed the conditions that should limit or restrict abandonment and ultimately agreed with the *NGC* holding.¹⁶ The *Howard* court found that the “purported contamination . . . does not present an imminent and identified harm to the public health and safety that would warrant the application of *Midlantic*’s narrow exception,” and permitted the chapter 13 trustee’s abandonment of the real property.¹⁷

30. Here, there is no “imminent and identifiable harm to the public health and safety,” as the Receiver has addressed all known alleged environmental issues of the RRC with respect to the Oil and Gas Properties. Assuming that the Court finds *Midlantic*, *NGC*, and *Howard* relevant to this Case’s facts, these decisions support the Receiver’s Oil and Gas Abandonment Motion.

CONCLUSION

The Receiver respectfully requests that the Court grant her Oil and Gas Abandonment Motion and grant her such other and further relief to which she may be entitled.

¹³ *In re Howard*, 533 B.R. 532 (Bankr. S.D. Miss. 2015).

¹⁴ *See generally* 533 B.R. at 538–40.

¹⁵ 533 B.R. at 549; *see also N.M. Env’t Dep’t v. Foulston (In re L.F. Jennings Oil Co.)*, 4 F.3d 887, 890 (10th Cir. 1993) (“[B]efore abandonment of a property can violate *Midlantic* the property must represent an immediate and identifiable harm to public health or safety.”) (citations omitted).

¹⁶ *See generally* 533 B.R. at 545–47.

¹⁷ *Id.* at 547.

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Respectfully submitted,

By: /s/ Danielle Rushing Behrends

Danielle Rushing Behrends
State Bar No. 24086961
dbehrends@dykema.com
DYKEMA GOSSETT PLLC
112 East Pecan Street, Suite 1800
San Antonio, Texas 78205
Telephone: (210) 554-5500
Facsimile: (210) 226-8395

and

Rose L. Romero
State Bar No. 17224700
Rose.Romero@RomeroKozub.com
LAW OFFICES OF ROMERO | KOZUB
235 N.E. Loop 820, Suite 310
Hurst, Texas 76053
Telephone: (682) 267-1351

COUNSEL TO RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2023, the foregoing document was served via CM/ECF on all parties appearing in this Case, including counsel for Plaintiff, Securities and Exchange Commission and counsel for the Railroad Commission of Texas.

/s/ Danielle Rushing Behrends

Danielle Rushing Behrends