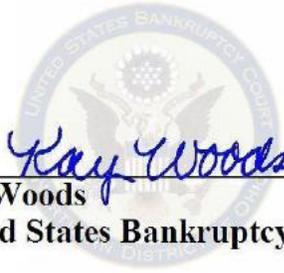


IT IS SO ORDERED.

Dated: July 12, 2016
10:01:42 AM



Kay Woods

 Kay Woods
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

D & L ENERGY, INC., et al.,

Debtors.

*
*
*
*
*
*
*

CASE NUMBER 13-40813

CHAPTER 7

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING STANDING OF BOBCAT ENERGY RESOURCES
LLC TO BRING APPLICATION OF BOBCAT ENERGY RESOURCES LLC FOR
ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM (DOCS. 1518 AND 1546)

On October 6, 2015 and December 15, 2015, respectively, Bobcat Energy Resources LLC ("Bobcat") filed Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim (Doc. 1518) and Amended and Supplemented Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim (Doc. 1546) (collectively, "Application"). On October 7, 2015, Bobcat filed Exhibit 1 to the Application, which is entitled Production Revenue Trust Agreement ("D & L Trust Agreement")

(Doc. 1519). In the Application, Bobcat seeks allowance of an administrative expense claim in an amount not less than \$1,443,582.00 pursuant to 11 U.S.C. § 503(b)(1)(A) ("Admin Claim"). The issue presently before the Court is whether Bobcat has standing to bring the Application on its own behalf and/or on behalf of third parties.

The following parties filed a response, joinder, and/or objection to the Application:

- The JV Responders filed Response, Joinder, and Limited Objection of D&L Joint Venture Working Interest Owners to Amended and Supplemented Application for Allowance of Administrative Expense Claim (Claim No. 253-3) Filed by Interested Party Bobcat Energy Resources, LLC ("JV Responders Response") (Doc. 1558) on January 18, 2016;¹
- Anthony J. DeGirolamo, Chapter 7 Trustee for the substantively consolidated estates of Debtors D & L Energy, Inc. and Petroflow, Inc. ("Trustee"), filed Objection of Anthony J. DeGirolamo, Chapter 7 Trustee, to the Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim ("Trustee Response") (Doc. 1561) on January 21, 2016;
- Everflow Eastern, Inc. and Everflow Eastern Partners, L.P. (collectively, "Everflow") filed Precautionary Joinder and Limited Objection to Amended and Supplemented Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim and Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim ("Everflow Response") (Doc. 1566) on January 26, 2016; and

¹ The JV Responders are: Alfred J. and Suzanne Fleming, Alfred J. Fleming, Ray Starr Revocable Trust, The Helen M. Bitonte Revocable Trust, Dominic A. Bitonte Revocable Trust, David A. Bitonte Revocable Trust, A. Gary Bitonte Revocable Living Trust, Renee Bitonte, James & Gail Parise Revocable Trust, James A. Parise, Joseph J. Parise Family Trust, Joseph J. Parise, Jo Marie Parise, Donald J. DeSalvo, Don DeSalvo, Donna J. Stevens, Joseph Tripodi, Joseph A. and Brenda J. Tripodi, Thomas N. Detesco, Thomas N. Detesco and Gloria Detesco, Michael E. Bushey, and Ray Starr Family Trust. (JV Responders Resp. at 2-3.)

- Atlas Resources, LLC, successor by merger to Atlas Resources, Inc. ("Atlas"), filed Joinder of Atlas Resources, LLC to Everflow Eastern, Inc. and Everflow Eastern Partners, L.P. Precautionary Joinder and Limited Objection ("Atlas Response") (Doc. 1569) on February 2, 2016.

Bobcat filed Bobcat Energy Resources' Reply to "Limited Objection" of the JV Responders and Enervest [sic] Entities ("Bobcat First Reply") (Doc. 1568) on January 28, 2016.

The Court held a hearing on the Application on February 3, 2016, at which appeared: (i) Andrew J. Petrie, Esq. on behalf of Bobcat; (ii) Jeremy M. Campana, Esq. on behalf of the Trustee; (iii) Robert A. Bell, Jr., Esq. on behalf of Everflow; (iv) James G. Floyd, Esq. on behalf of the JV Responders; and (v) Emily W. Ladky, Esq. on behalf of Atlas. Following the hearing, the Court entered Order Setting Briefing Schedule and Suspending Formal Discovery ("Briefing Order") (Doc. 1570), in which the Court directed the parties to file briefs regarding Bobcat's standing to bring the Application. Specifically, the Court ordered Bobcat to file a brief "setting forth (i) Bobcat's standing to bring the Application on its own behalf, (ii) the identity of each third party on whose behalf Bobcat filed the Application, and (iii) the basis for Bobcat's standing to file the application on behalf of those third parties[.]" (Briefing Order ¶ 1.)

Pursuant to the Briefing Order, on February 17, 2016, Bobcat filed Bobcat Energy Resource's [sic] Brief Setting Forth the Bases for its Standing to Bring its Amended and Supplemental Application

for Allowance of Administrative Expense Claim ("Bobcat Brief") (Doc. 1572) and Declaration of Robert Rivkin ("Rivkin Declaration") (Doc. 1573). On February 24, 2016, the following response briefs were filed:

- The JV Responders filed D&L Joint Venture Working Interest Owners' Brief on Standing of Interested Party Bobcat Energy Resources, LLC ("JV Responders Brief") (Doc. 1576);
- Everflow filed Everflow Entities Response Brief to Bobcat Energy Resource's Brief Setting Forth the Bases for its Standing to Bring its Amended and Supplemental Application for Allowance of Administrative Expense Claim ("Everflow Brief") (Doc. 1579);
- The Trustee filed Response Brief of Anthony J. DeGirolamo, Chapter 7 Trustee, with Respect to Standing of Bobcat Energy Resources LLC to Assert Administrative Expense Claim on Behalf of Itself and Third Parties ("Trustee Brief") (Doc. 1580); and
- Atlas filed Response Brief of Atlas Resources, LLC, in Opposition to Bobcat Energy Resource's Brief Setting Forth the Bases for it's [sic] Standing to Bring its Amended and Supplemental Application for Allowance of Administrative Expense Claim ("Atlas Brief") (Doc. 1581).

On March 2, 2016, Bobcat filed the following:

- Reply to the Response Brief of Atlas Resources, LLC in Opposition to Bobcat Energy Resources's Brief Setting Forth the Bases for its Standing to Bring its Amended and Supplement Application for Allowance of Administrative Expense ("Bobcat Atlas Reply") (Doc. 1584). Attached thereto at pages 7 through 10, but not referenced as an exhibit, is Declaration of Bruce E. Smith;
- Bobcat Energy Resource's [sic] Reply in Support of its Brief Setting Forth the Bases for its Standing to Bring its Amended and Supplemental Application for Allowance of Administrative Expense Claim ("Bobcat General Reply") (Doc. 1585); and

- Declaration of Bruce E. Smith (Doc. 1586), which is not linked to any other pleading.

On March 4, 2016, the Court entered Order Striking Declarations of Bruce E. Smith (Doc. 1591). The Court, *sua sponte*, struck the declarations of Mr. Smith (Docs. 1584 at 7-10 and 1586) because they did not comport with the Federal Rules of Evidence.

In order to better understand the basis for Bobcat's assertion that it is a creditor asserting its own rights, on March 28, 2016, the Court entered Order Requiring Bobcat Energy Resources LLC to File a Supplement Identifying its Own Interest in the Entities Bobcat Purports to Represent for Purposes of the Administrative Expense Claim (Doc. 1597). In response, Bobcat filed Bobcat Energy Resource's [sic] Court-Ordered Supplement ("Bobcat Supplement") (Doc. 1635) on April 22, 2016. On July 1, 2016, Bobcat filed Bobcat Energy Resource's [sic] Supplement to its Previous Court-Ordered Supplement ("Second Bobcat Supplement") (Doc. 1649).

For the reasons set forth herein, the Court finds that Bobcat does not have standing to assert the Admin Claim on its own behalf or on behalf of third parties. As a consequence, the Court will deny the Application.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding

pursuant to 28 U.S.C. § 157(b)(2)(B). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. BACKGROUND

Debtors D & L Energy, Inc. ("D & L") and Petroflow, Inc. (collectively, "Debtors") filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code on April 16, 2013.²

On the petition date, the Debtors filed Motion of Debtors and Debtors in Possession for Entry of an Order Authorizing the Maintenance of Trust Bank Account, PPM Accounts, and Continued Use of Existing Business Forms (Doc. 8) ("Trust Account Motion"), in which they made the following representations:

17. Prior [sic] the commencement of this case, in the ordinary course of business, D&L maintained a production trust account . . . (the "Trust Account") pursuant to the Production Revenue Trust Agreement (the "Trust Agreement") in which D&L is the acting Trustee.

18. As Trustee, D&L is obligated to hold, manage, collect and receive production income from oil and gas well joint ventures in which D&L is the operator and manager (the "Joint Ventures") and distribute the same to well investors, landowners, royalty owners and carried interest holders (collectively the "Beneficiaries") after payment of necessary expenses incident to the operation and management of the Joint Ventures.

* * *

² Although the pleadings and exhibits thereto routinely refer to the Debtor as D&L Energy, Inc., the Voluntary Petition (Doc. 1) lists the entity as D & L Energy, Inc., which is the form the Court will use.

21. The Trust Account . . . [is a] pass through account[] D&L utilizes in order to fulfill its obligations under the terms of the Trust Agreement The incoming funds are earmarked upon receipt as payable to the Beneficiaries . . . and one-hundred (100%) percent of the funds deposited are distributed monthly.

(Trust Acct. Mot. ¶¶ 17-18, 21.) The Debtors sought to continue to manage and distribute funds from the D & L Trust Account pursuant to the D & L Trust Agreement in order to prevent the Debtors from potentially breaching their fiduciary duties and contractual obligations to third parties.³ (*Id.* ¶¶ 25-26.) On May 14, 2013, the Court entered Final Order Granting Motion of Debtors for Entry of an Order Authorizing the Maintenance of Trust Bank Account and Continued Use of Existing Business Forms ("Trust Account Order") (Doc. 92), in which the Court permitted the Debtors to continue to manage and distribute funds from the D & L Trust Account.

On October 30, 2014, the Court authorized the sale of substantially all of the Debtors' assets to Resource Land Holdings, LLC ("RLH"), an affiliate of Bobcat, pursuant to Order (i) Authorizing the Public Sale of the Acquired Public Sale Assets, Free and Clear of Liens, Claims, Encumbrances and Interests; and (ii) Granting Related Relief ("Sale Order") (Doc. 1044). Exhibit 1 to the Sale Order is the executed Asset Purchase Agreement ("APA")

³ D & L Trust Account and D & L Trust Agreement are defined *infra* at 9.

among the Debtors and RLH.⁴ Section 1.1 of the APA defined the "Acquired Assets" to be sold to RLH or Bobcat.

On March 25, 2015, the Debtors' bankruptcy cases were converted to chapter 7 (see Doc. 1379) and Mr. DeGirolamo was appointed Chapter 7 Trustee (see Doc. 1380). The Debtors' cases were substantively consolidated on May 28, 2015 (see Doc. 1462).

On December 15, 2015, Bobcat filed a proof of claim denominated Claim No. 253-3, in which it asserts a priority claim pursuant to 11 U.S.C. § 507(a)(2) and an administrative expense claim pursuant to 11 U.S.C. § 503(b)(1)(A) in the amount of \$1,443,582.00 – *i.e.*, the Admin Claim.⁵ The basis for Claim No. 253-3 is "breach of contract; breach of fiduciary duty." (Claim No. 253-3 at 1.) Exhibit A to Claim No. 253-3 is an untitled, eight-page document that details the basis for Claim No. 253-3. Bobcat also filed a proof of claim denominated Claim No. 252-3, in which it asserts a general unsecured claim in the approximate amount of \$19,170,494.00. Claim No. 252-3 is not related to the Application.

II. ARGUMENTS OF THE PARTIES

Throughout their pleadings, the parties reference the same documents and accounts but ascribe different definitions and

⁴ The APA was entered into among the Debtors and "Resource Land Holdings, LLC, a Colorado limited liability company ('RLH') or Bobcat Energy Resources, LLC, an affiliate thereof ('Buyer')." (APA at 1.)

⁵ Bobcat timely filed Claim No. 253-1 on July 31, 2015.

provide different citations thereto. For clarity, the Court will refer to the relevant documents and accounts as follows:

- "Atlas Agreement": (i) Joint Venture Agreement dated January 17, 2005 between D & L and Atlas (p. 2-17); (ii) Model Form Operating Agreement dated February 1999 between D & L as operator and Atlas (p. 18-37); and (iii) Accounting Procedure Joint Operations dated February 1999 between D & L and Atlas (p. 38-48). Docket Reference: Limited Objection of Atlas Resources, LLC to the Debtors' Motion for Entry of Order Authorizing the Sale of Substantially All of the Debtors' Assets (Doc. 442), Ex. A;
- "Bobcat Trust Account": The production trust account maintained by Bobcat pursuant to the Bobcat Trust Agreement, as set forth in the Rivkin Declaration (Doc. 1573) ¶¶ 5-6;
- "Bobcat Trust Agreement": Production Trust Agreement dated December 1, 2014 among Bobcat as trustee and Bobcat Well & Pipeline, LLC and Bobcat Minerals, LLC as manager-grantor. Docket Reference: Declaration of Robert Rivkin (Doc. 1573), Ex. A;
- "D & L Trust Account": The production trust account maintained by D & L pursuant to the D & L Trust Agreement, as set forth in the Trust Account Motion (Doc. 8) ¶ 17;
- "D & L Trust Agreement": Production Revenue Trust Agreement dated November 30, 2012 between D & L as trustee and D & L as manager-grantor. Docket Reference: Application, Ex. 1 (Doc. 1519);
- "Everflow Agreement": Operating Agreement dated July 8, 2014 between D & L as operator and Everflow Eastern Partners, LP as owner. Docket Reference: Motion for an Order Allowing Debtors to Assume and Assign Executory Contracts Between D&L Energy, Inc. and Everflow Eastern Partners, L.P. (Doc. 739), Ex. A; and
- "JV Agreement": (i) DL Joint Venture Certificate and Agreement of Joint Venture, undated, among D & L as manager and unidentified parties (p. 8-14); and (ii) DL Joint Venture Operating Agreement, undated, among D & L as operator and unidentified parties (p. 15-19). Docket Reference: Second Omnibus Motion for an Order: Allowing Debtors to Assume and

Assign Executory Contracts Related to D&L Energy Joint Ventures and Participation Programs to Bobcat Energy Resources, LLC per the September 9, 2014 Asset Purchase Agreement ("Omnibus Assignment Motion") (Doc. 1197), Ex. B - Affidavit of Nicholas Paparodis, Ex. 1.

A. Application and Responsive Pleadings

1. Application

In the Application, Bobcat begins by describing certain of the Debtors' interests that it purchased pursuant to the APA:

Bobcat acquired both: (1) D&L Energy's interests in certain oil and gas producing wells located in Ohio and Pennsylvania, which interests D&L Energy owned as either a joint venture partner or investor; and (2) D&L Energy's responsibilities for the management and operation of the various assets and entities for which D&L Energy was acting as manager, managing member, general partner and/or operator These interests are not, however, mutually exclusive because acting as the manager, managing member, general partner, and/or operator under category (2), Bobcat acts for both unrelated third parties and for its own account as a joint venture partner or investor under category (1). Bobcat brings this motion as manager, managing member and/or general partner on behalf of all of the interest holders.

(Doc. 1518 at 2 (citations omitted).)⁶ Bobcat states that the Admin Claim "arises out of transactions that preceded [entry of the Sale Order]" (*Id.*) Specifically, the Admin Claim is based on three categories of breaches of fiduciary duty in which D & L is alleged to have engaged post-petition:

(1) breaches of the Trust Agreement governing the Trust Account; (2) breaches of the fiduciary obligations D&L

⁶ For citation purposes, the Court will reference the original Application filed by Bobcat on October 6, 2015 as Doc. 1518 and reference the Amended and Supplemented Application filed by Bobcat on December 15, 2016 as the Application. In the text of this Memorandum Opinion, the Court will reference those documents collectively as the Application.

Energy owed the various joint ventures as the promoter and operator of those ventures; and (3) breaches of the fiduciary obligations D&L Energy owed the limited liability companies ("LLCs") and the limited partnerships ("PPMs") as the manager, managing member or general partner and/or operator.

(*Id.* at 6.) Bobcat ascribes the same definitions to the terms "Trust Agreement" and "Trust Account" as set forth in the Debtors' Trust Account Motion (Appl. at 3-4, n.4) – *i.e.*, what the Court has defined as the D & L Trust Agreement and the D & L Trust Account, respectively.

With respect to the alleged harm suffered by the third parties for whom Bobcat purports to bring the Application, Bobcat states,

[T]hese improper transactions reduced the amounts available to pay the Beneficiaries the amounts due them for and as a result of D&L Energy's post-petition operations. Unless D&L Energy is required to pay Bobcat's administrative expense claim, the Beneficiaries will be harmed because Bobcat, as current trustee of the Production Account, will not have the funds to pay the Beneficiaries the outstanding amounts to which they are rightfully entitled for the post-petition period.

(*Id.* at 17 (n.5 omitted) (emphasis added).) "The 'trust bank account,' 'trust account' or 'production trust account' to which [the Debtors' Trust Account Motion] refers, which was not an asset of the estate, is the same account to which the Debtor [sic] and other interested parties have since referred [sic] as the 'Production Account'" (*id.* at 3 (internal citation omitted)) – *i.e.*, what the Court has defined as the D & L Trust Account.

2. JV Responders Response

In their response, the JV Responders do not address Bobcat's standing to assert the Admin Claim. However, the JV Responders argue, "To the extent Bobcat is acting as a manager, operator, or in any other capacity pursuant to D&L Joint venture agreements, Bobcat has a duty to distribute any administrative claims it receives from the bankruptcy court to the working interest co-owners." (JV Responders Resp. at 1.)

3. Trustee Response

The Trustee posits that the Application should be denied in its entirety because Bobcat lacks standing. The Trustee argues,

Bobcat filed a single Administrative Claim and Priority POC asserting it is a "creditor and representative of other creditors" and that it "brings [the Admin Claim] as manager, managing member and/or general partner on behalf of all the interest holders" but Bobcat glosses over the actual basis for its standing to bring these Claims. [Claim No. 253-3] at 1; [Doc. 1518] at 2. The [D & L Trust Agreement] on which Bobcat relies to substantiate its standing was not assumed and assigned, nor was Bobcat appointed the successor trustee. There are no obligations under the APA that Bobcat assumed that would make it a fiduciary under the [D & L Trust Agreement]. APA, § 1.4. Nor did Bobcat purchase any of the estate's own claims that it may be entitled to make against third parties in its own right as an investor in the Investment Vehicles. See APA § 1.2.9.

Moreover, the docket is barren of claim assignments to Bobcat, and Bobcat provides no evidence of authority to bring these claims or Investors' consent to this representation. In fact, based on a November 17, 2015 letter from Bobcat attached to a recent filing by certain "JV Responders" in response to the Administrative Claim ([JV Responders Resp.]), it appears Bobcat did not even

consult with the Investors before filing claims on their behalf. The JV agreements do not provide blanket consent for Bobcat to proceed with prosecution of the Bobcat Claims. See, e.g., Doc. 704, Exhibit E (the authority of the "Manager" is strictly limited to specific operational authorities, none of which include the institution of complex litigation against a former co-venturer, and all of which require prior consultation with co-venturers). Bobcat does not claim to be a class representative, nor has any class been certified by this Court at this late stage. Except for Bobcat's own investment interest (which summarily fails as discussed in this section and below), these claims belong to the Investors and Investment Vehicles, not Bobcat.

Bobcat's standing is also undermined by inconsistent positions it has taken in class action litigation in the District Court for the Northern District of Ohio, where many of the same Investors for whom Bobcat now purports to act have sued Bobcat. Specifically, Bobcat has represented to that court it has "no connection" with these Investors and supported this assertion with the affidavit of Bobcat's CEO, Robert Rivkin and documentation showing the true "successor" to Debtor and manager and operator of the purchased wells is in fact an entirely different entity. See *JLXX Corp., et al. v. Bobcat Energy Resources, LLC, et al.*, Case No. 4:15-cv-01993 at Doc. 5, PageID #40 (N.D. Ohio, Oct. 2, 2015) and exhibits thereto

(Trustee Resp. at 4-5 (n.8-11 omitted).)

4. Everflow and Atlas Responses

In its response, Everflow reserves the rights to address the issue of standing. Everflow further states,

The Everflow Entities also reserve their rights to assert their own administrative expense claim and proofs of claim relating to claims addressed in Bobcat's Application and Proofs of Claim. . . .

Everflow Entities' interests in the claims asserted by Bobcat are unclear. . . .

The exhibits attached to the Application and Proof of Claim do not shed much light on the beneficiaries of many of Bobcat's claims. And Bobcat has refused to provide the Everflow Entities with documentation relating to the historical and recent operations of the wells for several months now. The Everflow Entities are, practically speaking, in the dark.

(Everflow Resp. at 5-6.)

Atlas joins the Everflow Response, states that Everflow and it are "identically situated parties," and likewise "reserves its rights to address any standing issued raised by the Chapter 7 Trustee in its objection [Docket No. 1561], as well as its rights to assert its own administrative expense claim and proofs of claim." (Atlas Resp. at 1-2.)

5. Bobcat First Reply

In the Bobcat First Reply, Bobcat specifies that it "will not address here those objections the Chapter 7 Trustee asserts that go to its standing" (Bobcat First Reply at 1.) However, Bobcat contends that the JV Responders and Everflow "do not question Bobcat's right to bring claims on their behalf, and, in fact, they join in Bobcat's assertion of an administrative claim for the post-petition amounts to the extent it encompasses their interests." (*Id.* at 3 (citations and n.3 omitted).)

B. Briefs Regarding Standing

1. Bobcat Brief

Bobcat states that it filed the Application on behalf of the following parties: "(1) [Atlas]; (2) [Everflow]; and (3) the joint

ventures, LLCs and PPMs listed on the attached Exhibit A" (collectively, "Interest Holders"). (Bobcat Br. at 1.) Bobcat explains that, pursuant to the Sale Order and APA,

Bobcat is currently the fiduciary for Bobcat's new Production Trust Account ("BPTA"), with the obligation as a matter of law to pursue claims for monies owed that account. In addition, Bobcat acts as the post-Closing manager and operator of Atlas, the Everflow Entities, and the joint ventures, LLCs and PPMs. As that manager and operator, Bobcat is the successor to D&L Energy because of the Acquired Assets it purchased under the [APA].

(*Id.* at 2.) Bobcat asserts, "As the new manager, operator and/or general partner from and after the Closing," Bobcat is "charged with receiving and managing funds / revenues that [do] not belong to it, but, rather, belong[] to the working interest owners and other third-party interest holders" and, thus, "it owe[s] those working interest owners and other third-party interest holders fiduciary obligations[.]" (*Id.* at 8.) Bobcat further states that "its fiduciary obligations [are] not constrained by any contract." (*Id.*)

Bobcat brings the Admin Claim in three capacities, which are set forth in greater detail below:

A. The fiduciary charged with the management and operation of the new BPTA, an account that was not and is not today an asset of the D&L Energy estate, but that is a new account Bobcat created and has operated from the December 1, 2014 Closing Date through the present.

B. The operator of the Atlas and Everflow Entities' interests, as the successor to D&L Energy

under the operating agreements assumed and assigned in this case.

C. A representative of the joint venture and participation program investment vehicles D&L Energy created and sold to Bobcat, acting for the benefit of all of the investors / interest holders in those vehicles.

(*Id.* at 4-5.)

i. Bobcat Trust Agreement

Bobcat rebuts the Trustee's contention that Bobcat derives its standing from the D & L Trust Agreement by arguing,

Bobcat does not base its claims and does not base its standing on the November 30, 2012 "Production [Revenue] Trust Agreement" into which D&L Energy as Trustee entered with D&L Energy as Manager/Grantor. Rather, Bobcat pointed to that document as the basis for the existence of the fiduciary obligations D&L Energy owed to the [sic] Atlas, the Everflow Entities, and joint venture and PPM working interest owners.

(Bobcat Br. at 7.) Bobcat "did not assume and accept an assignment of the 2012 D&L Energy Trust Agreement" but, instead, "entered into the new Trust Agreement to govern the management, maintenance and operation of the BPTA post-Closing." (*Id.* at 9.)

Bobcat asserts that, "[a]s the fiduciary responsible for the management of the BPTA, Bobcat is charged with the duty and responsibility to collect and protect the corpus of that account, or the Trust Property." (*Id.* at 18 (citations omitted).) Furthermore, Bobcat states, "As a matter of law, the trustee is charged with the responsibility to pursue the claims of this trust." (*Id.* at 18-19 (citing O.R.C. § 5808.11 ("[a] trustee shall

take reasonable steps to enforce claims of the trust.”).) As a result, Bobcat concludes that “[b]oth the express provisions of the BPTA and the Ohio statute confer standing on Bobcat to pursue these claims for monies owed the new BPTA.” (*Id.* at 19.)

ii. Assigned Contracts

As contemplated in the APA, the Debtors assumed and assigned certain executory contracts to Bobcat (“Assigned Contracts”) pursuant to the Omnibus Assignment Motion,⁷ which the Court granted, in part, on January 29, 2015, upon entry of Order Granting, in Part, Debtors’ Second Omnibus Motion for an Order Allowing Debtors to Assume and Assign Executory Contracts Related to D&L Energy Joint Ventures and Participation Programs to Bobcat Energy Resources, LLC per the September 9, 2014 Asset Purchase Agreement (“Assumption and Assignment Order”) (Doc. 1277). Bobcat represents that the Assigned Contracts include every operating agreement among the Debtors and Everflow, every operating agreement among the Debtors and Atlas, and every certificate and agreement of joint venture associated with the Debtors’ operations, subject to specified restrictions. (Bobcat Br. at 11-12 (citing Omnibus Assignment Motion; APA, Sched. 1.1(b) ¶¶ 2-4, 6).) Bobcat asserts that it has the authority to bring the Admin Claim based on the Assigned Contracts, pursuant to which

⁷ Defined *supra* at 9-10.

it is the manager and operator of the participation programs and joint ventures.

Bobcat states that the Atlas Agreement "provides Bobcat sweeping powers with respect to the management of the wells and the working interests Atlas holds in those wells." (*Id.* at 19 (citing Atlas Agreement).) Specifically, the Atlas Agreement "directs that D&L Energy, as operator, 'shall conduct and direct and have full control of all operations on the Contract Area, as permitted and required by, and within the limits of this agreement.'" (*Id.* (quoting Atlas Agreement, Art. V(A)).) Moreover, Bobcat asserts that it is to provide all accounting services and the "sole discussion of the pursuit of claims 'is to limit D&L Energy's ability to settle a 'suit arising from operations hereunder.'" (*Id.* (quoting Atlas Agreement, Art. X).) "As such, bringing a claim does not fall outside of the limits of this agreement." (*Id.*)

Likewise, Bobcat contends that the Everflow Agreement, although expressly stating that it does not create a joint venture or commercial partnership, "provides Bobcat sweeping powers with respect to the management of the wells and the working interests the Everflow Entities hold in those wells." (*Id.*)

Relying on the above-referenced provisions of the Atlas Agreement and Everflow Agreement, Bobcat states, "By their silence on pursuing claims to properly fulfill their obligations, and the

negative pregnant clauses concerning settlement of claims, both agreements authorize Bobcat to bring a claim or suit arising out of its operations of the wells and the Atlas and/or Everflow Entities' working interests." (*Id.* at 20 (citation and parenthetical omitted)).

Finally, Bobcat references the JV Agreement, which is representative of the standard certificate and agreement of joint venture and related operating agreement used by the Debtors (see Omnibus Assignment Mot., Ex B - Affidavit of Nicholas Paparodis ¶ 5). Bobcat states that "Ohio partnership law governs the various joint ventures and/or participation programs" and, "[a]s a matter of law, a partner is authorized to act on behalf of the partnership." (*Id.* at 20-21 (citations and parentheticals omitted).) Specifically, Bobcat asserts that the JV Agreement "authorize[s] Bobcat, as manager, to act as agent for the venture and to be 'responsible for the overall supervision of the operation of the well(s).'" (*Id.* at 21 (citations omitted).)

Summarizing the authority granted to it by the above-referenced contracts, Bobcat states,

There is nothing in the [Atlas Agreement], [Everflow Agreement], the joint venture or the participation program agreements, or the pipeline operating agreements that would restrict the manager or operator's authority or ability to bring an action to collect monies owed to / diverted from the D&LPTA. And, this action is not one that Ohio law prohibits. See O.R.C. § 1776.45.

(*Id.* at 21.)

iii. Consent

Bobcat concludes its brief by noting that no “working interest holder” or “joint venturer / program participant” has objected to Bobcat pursuing the Admin Claim. (Bobcat Br. at 23.) Bobcat further observes, “Because of the extent of their working interests, the lion’s share of the recoveries to the BPTA will go to benefit the Everflow Entities and Atlas – the two biggest working interest owners in all of the D&L Energy wells.” (*Id.*)

2. JV Responders Brief

The JV Responders are “investors and co-owners in joint ventures of purchased working interests in oil and gas well leases owned, or previously owned, by Debtor, pursuant to contracts with the Debtor, D & L Energy, Inc.” (JV Responders Br. at 1.) The JV Responders do not dispute that Bobcat has standing to pursue its own claims, but assert that those claims “are limited to D & L’s working interest ownership percentages for distribution from each joint venture.” (*Id.* at 1-2.) However, the JV Responders argue that Bobcat has not established standing to pursue claims on their behalf.

The focus of the JV Responders Brief is that the joint venture agreements are akin to partnership agreements. Pursuant to partnership law, the JV Responders contend that D & L was unable to transfer its management and control rights in the joint ventures

absent specific contractual language to that effect. The JV Responders maintain that the joint venture agreements and operating agreements did not permit D & L to unilaterally transfer its operating rights to Bobcat.⁸ (*Id.* at 11.) Instead, “[b]y the contract language, management control and authority is, and always has remained, in the co-venturers like a partnership.” (*Id.* at 12.) Moreover, the JV Responders argue, “Because Bobcat failed to provide written notice to co-venturers, it should be estopped from claiming the provisions for transfer of the operating agreements (i.e., paragraph 11 [of the JV Agreement at 17], as claimed).” (*Id.* at 13 (citation omitted).)

To summarize, the JV Responders argument is as follows:

JV Responders hereby claim that Bobcat cannot assume, and is precluded by law from exercising, management or operation of the joint ventures merely by purchasing D & L’s working interests. Once D & L’s joint venture working interest is sold to a third-party (Bobcat), partnership law kicks in and prevents a third party from managing and controlling the joint venture. There are no contractual provisions that allow Bobcat to automatically assume management and/or control.

(*Id.* at 14.)

⁸ Throughout their brief, the JV Responders generically reference “joint venture agreements” and “operating agreements.” The JV Responders indicate that many of those contracts have been filed as exhibits to proofs of claims, including Claim No. 231-1 filed by Alfred J. Fleming, who filed the JV Responders Brief. (JV Responders Br. at 8-9.) The Certificate and Agreement of Joint Venture attached to Claim No. 231-1 as Exhibit A and the Operating Agreement attached to Claim No. 231-1 as Exhibit C appear to contain terms identical to the JV Agreement defined *supra* at 9-10.

3. Everflow Brief

Everflow "own[s] certain working interests in certain oil and gas wells, and other related oil and gas assets and property interests, that were operated by the Debtor D & L Energy, Inc. . . ." (Everflow Br. at 1.) Everflow states that those working interests are governed by the Everflow Agreement, which was assumed by the Debtors and assigned to RLH (see Doc. 791). (Everflow Br. at 2.)

Everflow refutes Bobcat's authority to file the Application on Everflow's behalf pursuant to the Everflow Agreement and states that it has not consented to Bobcat doing so.

The Everflow Entities were not advised by Bobcat of the nature, extent and character of its investigation into, preparation of and/or assertion [sic] the administrative expense claims. Nor did Bobcat request the Everflow Entities' approval to perform such tasks.

* * *

. . . The claims purportedly asserted by Bobcat on the Everflow Entities' behalf are the Everflow Entities' claims, and Bobcat was not authorized to investigate, nor assert these claims against the Debtor's [sic] bankruptcy estate.

(*Id.* at 3-4.)

Everflow argues that Bobcat is allegedly pursuing the Admin Claim on its behalf pursuant to one of the following three bases: (i) the authority granted Bobcat in the Everflow Agreement; (ii) the lack of restrictive provisions in the Everflow Agreement preventing Bobcat from bringing claims on behalf of Everflow; and

(iii) Everflow's ratification of Bobcat's actions. Everflow contends that the Everflow Agreement "does not provide Bobcat with the authority to bring claims against third parties on the Everflow Entities' behalf[,]" despite Bobcat "baldly stat[ing] that the Operating Agreement 'provides Bobcat sweeping powers.'" (*Id.* at 5.) Everflow states that the Everflow Agreement provides Bobcat limited powers to act on behalf of Everflow, which are explicitly set forth therein. "Nowhere in the Operating Agreement does it mention, let alone grant to Bobcat, the right to bring claims against third parties." (*Id.*) Everflow likewise refutes Bobcat's argument that the Everflow Agreement's silence with respect to Bobcat's authority to assert claims against third parties implicitly grants Bobcat such authority. "Under this view, counterparties to contracts in which performance obligations are involved would need to specifically include language in the agreement stating that the other party does not have authority to bring suit on its behalf in order [sic] prevent standing. That is clearly not the law." (*Id.* at 5-6.) Finally, regarding ratification, Everflow states, "[T]o be absolutely clear, the Everflow Entities do not approve of the actions taken by Bobcat." (*Id.* at 6.) As a consequence, Everflow "request[s] that the Court deny Bobcat's request for administrative expense claims, without prejudice as to the Everflow Entities, as the Everflow Entities

reserve their right to bring such claims in their own right.”
(*Id.*)

4. Trustee Brief

The Trustee contends that there are only three potential sources for Bobcat’s standing to bring the Application: (i) Ohio statutory trust and partnership law; (ii) the relevant joint venture and operating agreements; and (iii) affirmative consent, each of which the Trustee argues Bobcat has failed to demonstrate. (Trustee Br. at 3.)

First, the Trustee argues that Ohio trust and partnership law does not authorize Bobcat to bring the Admin Claim on behalf of the Interest Holders identified in the Application. (*Id.*) O.R.C. § 1776.31, upon which Bobcat relies, states in its entirety,

Both of the following govern the acts of a partner, subject to any statement of partnership authority under section 1776.33 of the Revised Code:

(A) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

(B) An act of a partner that is not apparently for carrying on in the ordinary course the partnership business or business of the kind the partnership carries on binds the partnership only if the act was authorized by the other partners.

O.R.C. § 1776.31 (2016). The Trustee asserts that, in filing the Application, Bobcat is neither acting in the ordinary course of business nor with the authorization of its partners.

Because Bobcat's conduct cannot fairly be said to fall within the ordinary course of its duties within the meaning of O.R.C. § 1776.31(A), in order for Bobcat to have standing, it must have obtained the authorization to assert these claims from its partners. Absent any affirmative evidence that such authorization has been obtained, the only remaining potential source for standing would be the operative documents.

(Trustee Br. at 4.)

Next, the Trustee argues that the standard certificate and agreement of joint venture and related operating agreement used by D & L - e.g., the JV Agreement - limit Bobcat's authority to act as agent for the joint ventures to specified operational activities, "none of which include the institution of complex litigation, and all of which require prior consultation with co-venturers, where appropriate." (*Id.* at 5 (n.8 omitted).) With respect to the Atlas Agreement and the Everflow Agreement, the Trustee notes that they both expressly provide that they do not create a partnership. (*Id.* at 6.) Thus, "Bobcat cannot rely on vague provisions of Ohio partnership law to maintain its standing as to Atlas and Everflow." (*Id.*) While Bobcat states that those agreements grant Bobcat the authority to settle claims, "[f]or Everflow, this settlement 'authority' relates to claims for less than \$5,000, and for Atlas, even less, at \$2,500." (*Id.* (citations

omitted).) "To claim the authority to bring complex multi-million dollar claims under these *de minimis* settlement provisions is beyond overreaching." (*Id.*)

The Trustee notes that only "Bobcat entities" are parties to the Bobcat Trust Agreement, which, "in essence, merely governs a bank account for the deposit of revenue of the Investment Vehicles and payment of related expenses." (*Id.* (citation omitted).) The Trustee states that the Interest Holders did not transfer any claims that they may have had against D & L to Bobcat and, "[a]s grantors under the [Bobcat Trust Agreement], Bobcat Well & Pipeline, LLC and Bobcat Minerals, LLC could not give Bobcat, as the new trustee, more property and powers than such entities held under the relevant investment agreements." (*Id.* at 7 (n.11 omitted).) Regarding those Bobcat entities, the Trustee notes,

At this juncture, it is worth noting that Bobcat is not the manager or operator of any of the Investment Vehicles. See Doc. 1573, Ex. A, Rivkin Decl. at ¶ 4(a) ("Bobcat transferred to Bobcat Well & Pipeline: the responsibilities for the operation and management" under all the relevant operating agreements). Instead, those responsibilities lie with Bobcat Well & Pipeline, LLC, which is not the applicant herein. *Id.*

(*Id.* at 5 n.7.)

The Trustee asserts, "Bobcat has not identified a single contractual document whereby any investor has granted authorization to Bobcat to pursue the Administrative Claim on the Investment Vehicle's behalf - a tacit admission that no such

authorization exists." (*Id.* at 7.) Finally, the Trustee concludes,

Pursuant to Bobcat's logic, because the relevant agreements and the Ohio Revised Code do not expressly *forbid* Bobcat to bring complex litigation against a former partner and investor, and because none of the investors have sought to *enjoin* Bobcat from doing so, Bobcat is therefore permitted to assert their claims. The shortcomings of this logic are apparent, which is likely why Bobcat cites no authority for this proposition.

In fact, the law on this topic is clear – standing may not be inferred from the pleadings or arguments; it must affirmatively appear in the record. Moreover, the party asserting jurisdiction bears the burden "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute."

As explained above and in the [Trustee Response], Bobcat has not met this burden.

(*Id.* at 9 (internal citations omitted).)

5. Atlas Brief

Atlas states that, pursuant to the Atlas Agreement, "Atlas owns a percentage of the working interest . . . in certain oil and gas wells . . . operated by D&L. D&L retained a limited ownership percentage in the Atlas Wells, and sold such interest to [Bobcat]."

(Atlas Br. at 2.) Atlas also possesses an ownership interest in the equipment installed on the property where the subject wells are located. (*Id.*) Atlas objects to Bobcat's standing to file the Application on its behalf as follows:

Atlas believes that Bobcat does not have standing to allege claims on Atlas's behalf against the debtors' respective bankruptcy estates or against any third

parties, including but not limited to Gasearch, S&B Investments and/or RF Consulting, especially any claims that arose prior to the December 1, 2014 closing date As a practical matter, prior to the Closing Date, Bobcat did not have any right or interest in these Wells, the related production trust accounts, or joint venture contractual agreements. Any liability debtor D&L, or a third party, may have regarding the control or operation of production trust accounts during the pre-Closing Date time period would be directly to the respective investors, not to the party who acquired the estate's rights and interests in the underlying wells or the related contractual agreements through a bankruptcy asset sale.

The Bobcat Brief also improperly implies that Atlas has acquiesced and ratified Bobcat's efforts to pursue these claims. Rather, on its own volition, Bobcat unilaterally investigated these claims and filed its [Application] on October 6, 2015. Bobcat did not advise Atlas of its investigatory actions for six weeks, until Bobcat sent Atlas a letter on November 17, 2015. A copy of the November 17, 2015 correspondence is attached hereto as Exhibit A. Instead of discussing the possibility of asserting claims against the debtors or other third parties, Bobcat simply took action and then attempted to charge Atlas for its efforts.

Finally, Atlas does not believe that Bobcat clearly has enunciated what claims it believes it may bring against the debtor's [sic] estate and the third parties. Without such clarity, Atlas does not believe Bobcat has satisfied its burden of establishing standing to assert any such mystery claims.

(*Id.* at 3 (n.1 omitted).) Furthermore, "Bobcat has not demonstrated, and it cannot demonstrate, that it suffered any actual or threatened injury for matters relating to the pre-Closing Date time period." (*Id.* at 5 (n.2 omitted).) Likewise, Bobcat has not stated how it has claims against the Debtors' based on the

Bobcat Trust Agreement, which Bobcat itself established upon the closing of the sale of the Acquired Assets to Bobcat. (*Id.*)

6. Bobcat Atlas Reply

Bobcat does not refute Atlas's argument that Bobcat "has not been injured because the BPTA's assets do not belong to Bobcat." (Bobcat Atlas Reply at 2.) Instead, Bobcat states that it is acting in its fiduciary capacity pursuant to the Bobcat Trust Agreement. (*Id.*) "When Bobcat established the BPTA it was underfunded because of monies D&L Energy and D&L Energy's insiders improperly diverted from the predecessor production trust account that D&L Energy operated ("D&LPTA"). It is Bobcat's fiduciary duty to seek the monies that should have been in the BPTA." (*Id.* at 2-3.)

Bobcat again maintains, "Because [the Atlas Agreement] provide[s] Bobcat with sweeping authority and an obligation to exercise full control over operations it is appropriate for Bobcat, as operator, in the reasonable and prudent exercise of its discretion and business judgment, to bring claims and commence litigation to recover amounts improperly paid out of the revenues from the [sic] each well." (*Id.* at 5.)

7. Bobcat General Reply

In its general reply, Bobcat begins by again asserting that the Bobcat Trust Agreement "charges Bobcat with the duty and responsibility to collect and protect the Trust Property"

(Bobcat Gen. Reply at 3 (citation omitted).) Furthermore, Bobcat states that, pursuant to Ohio law, "A successor trustee is liable for breach of trust if he neglects to take proper steps to compel his predecessor to deliver the trust property to him." (*Id.* (citation omitted).)

Next, Bobcat again argues that the contracts governing the joint ventures and partnership agreements, pursuant to which Bobcat is the operator and manager, provide Bobcat standing to pursue the Admin Claim. (*Id.* at 4-6.) However, Bobcat does not cite any specific portions of those contracts. Instead, Bobcat cites and quotes portions of the Debtors' motions to assume and assign executory contracts – e.g., the Omnibus Assignment Motion – that paraphrase, in the Debtors' words, the Debtors' duties pursuant to the relevant contracts.

With respect to the JV Responders, Bobcat argues that the JV Responders have admitted Bobcat's standing in their brief: "To the extent that Bobcat purchased the rights and responsibilities of management and/or operation of the joint ventures (or any other Business Entities) from the bankruptcy estate, Bobcat could claim standing to enforce the rights of third parties." (JV Responders Br. at 5; see Bobcat Gen. Reply at 7-8.)

With respect to Everflow, Bobcat argues, "The Everflow Entities' response addresses only Bobcat's position on its rights to proceed under the operating agreement, and generally ignores

Bobcat's fiduciary obligations to address the defalcations in the BPTA" (Bobcat Gen. Reply at 16.) Bobcat then discusses how the duties imposed upon it by the Everflow Agreement translate to the Bobcat Trust Agreement: "Historically, and before the Closing, D&L Energy conducted the functions of paragraphs 3, 4 and 6 [of the Everflow Agreement] through the D&LPTA. Following the Closing, these are ones Bobcat has carried out through the BPTA." (*Id.* at 17.) Bobcat asserts that, by appointing Bobcat its attorney in fact and authorizing Bobcat to collect revenue and pay expenses, Everflow "necessarily authorized Bobcat to act in [its] stead and to collect those amounts by any reasonable means necessary." (*Id.* (citation omitted).)

And, after appointing Bobcat as its attorney-in-fact and granting it broad powers to act with respect to revenues and expenses, it is important to note that in those few restrictions the Everflow Entities did impose, they did not make any provision that would restrict actions to collect revenues and litigation to collect revenues.

(*Id.*)

III. LEGAL STANDARD FOR STANDING

There are two elements to standing – *i.e.*, the constitutional dimension and prudential limitations.

In its constitutional dimension, standing imports justiciability: . . . the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr*, 369 U.S. 186, 204 (1962). . . . A federal court's jurisdiction therefore can be invoked only when the

plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . . ." *Linda R. S. v. Richard D.*, 401 U.S. 614, 617 (1973). See *Data Processing Service v. Camp*, 397 U.S. 150, 151-154 (1970).

Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (n.10 omitted).

Moreover, the Supreme Court has held that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* at 499 (citations omitted).

Hence, the "irreducible minimum" constitutional requirements for standing are proof of injury in fact, causation, and redressability. See [*Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)]. A plaintiff bears the burden of demonstrating standing and must plead its components with specificity. See *id.*

In addition to the constitutional requirements, a plaintiff must also satisfy three prudential standing restrictions. First, a plaintiff must "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499 (citations omitted). Second, a plaintiff's claim must be more than a "generalized grievance" that is pervasively shared by a large class of citizens. See *Valley Forge*, 454 U.S. at 474-75. Third, in statutory cases, the plaintiff's claims must fall within the "zone of interests" regulated by the statute in question. See *id.* These additional restrictions enforce the principle that, "as a prudential matter, the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted." *Pesttrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991).

Coyne v. American Tobacco Co., 183 F.3d 488, 494 (6th Cir. 1999).

IV. ANALYSIS

A. Transfer to Bobcat Well & Pipeline, LLC

In its response, the Trustee argues that Bobcat lacks standing to bring the Application because Bobcat has transferred its interests in the Acquired Assets. (Trustee Resp. at 5-6.) For the reasons set forth below, the Court agrees.

Pursuant to the APA, Bobcat states that it has acquired:

(1) D&L Energy's interests in certain oil and gas producing wells located in Ohio and Pennsylvania, which interests D&L Energy owned as either a joint venture partner or investor; and (2) D&L Energy's responsibilities for the management and operation of the various assets and entities for which D&L Energy was acting as manager, managing member, general partner and/or operator

(Doc. 1518 at 2.) The APA provided for the Debtors to sell the Acquired Assets to RLH or its affiliate, Bobcat. The Assigned Assets included the Assigned Contracts, which were assigned to Bobcat pursuant to the Assumption and Assignment Order. Bobcat represents that the Assigned Contracts "included the Atlas, Everflow Entities and joint ventures' operating agreements." (Bobcat Br. at 12 (citation omitted).) However, Bobcat represents that it further assigned and transferred certain of the Acquired Assets, including the Assigned Contracts, to two of its wholly-owned subsidiaries, Bobcat Well & Pipeline, LLC ("BW&P") and Bobcat Minerals, LLC ("BM"). (Rivkin Decl. ¶¶ 2, 4.)

Robert Rivkin, Chief Executive Officer of Bobcat (*id.* ¶ 1),
declared under penalty of perjury:

4. Bobcat transferred certain assets to its two subsidiaries to group like responsibilities and assets, and make rational the operation and management of the [Assigned] Contracts and Acquired Assets, it obtained pursuant to the Public Sale APA. The assets Bobcat transferred are:

a. Bobcat transferred to Bobcat Well & Pipeline: the responsibilities for the operation and management of: (i) the Atlas operating agreement; (ii) the Everflow Entities' operating agreement; (iii) the joint ventures' and LLC operating agreements for the wells and pipelines; and (iv) Bobcat Minerals' interests.

b. Bobcat transferred to Bobcat Minerals: the ownership of oil and gas leases; pipeline rights-of-way; real property; investment working interests (IWI's); carried working interests (CWI's); overriding royalty interests (ORRI's); the 25% interest in the 2007-A PPM; the 25% interest in the 2008-A PPM; the 13% interest in the 2010-A PPM, and the Vernon and Duferco pipelines.

(*Id.* ¶ 4; see also Bobcat Br. at 9-10 n.4 ("Those are interests Bobcat has since transferred to its subsidiaries, [BW&P] (operating the wells for third parties) and [BM] (holding the interests Bobcat purchased under the Public Sale APA)."))

As set forth *supra* at 12-13, the Trustee argues that Bobcat has taken inconsistent positions regarding Bobcat's relationship to the Interest Holders on whose behalf Bobcat asserts that it has brought the Application. The Trustee points out that, in litigation brought by certain of the Interest Holders in the District Court for the Northern District of Ohio, *JLKK Corp. v.*

Bobcat Energy Resources, LLC, 4:15-cv-01993-BYP (N.D. Ohio 2015) ("District Court Litigation"), Bobcat represented that it had "no connection" with the Interest Holders and that the true "successor" to the Debtors and the manager and operator of the Acquired Assets is, in fact, BW&P. (Trustee Resp. at 5 (citations omitted).) Specifically, in a motion to dismiss jointly filed by Bobcat and RLH in the District Court Litigation on October 2, 2015, Bobcat and RLH stated,

Plaintiffs have named the wrong business entity as Defendant in this action and sued business entities that have no connection with Plaintiffs as alleged in the Complaint. Attached is the affidavit of Robert Rivkin who states that the entity of Bobcat Well & Pipeline, LLC ("BW&P") is the successor in interest to D & L Energy, Inc.'s rights and interests as Manager and Operator of the numerous joint ventures and wells listed in Plaintiffs' Complaint.

* * *

As discussed above, BW&P is the successor in interest to D & L Energy, Inc. and the current Operator and Manager of the wells and joint ventures listed in Plaintiffs' Complaint.

(*Id.*, Ex. A at 5-6 (citations omitted).)⁹ The Trustee argues that, having transferred to BW&P the responsibilities for the management and operation of the Assigned Assets, Bobcat cannot have standing to assert any rights as manager and/or operator.

⁹ The motion to dismiss filed in the District Court Litigation is attached to the Trustee Response as Exhibit A.

Bobcat totally ignores this issue in each of its three briefs regarding standing. Based on (i) Bobcat's position in the District Court Litigation that BW&P is the true successor to D & L as manager and operator of the Acquired Assets; and (ii) the Rivkin Declaration filed herein, which states that Bobcat transferred to BW&P the management and operation of the Acquired Assets, this Court finds that Bobcat has transferred its interest in the Acquired Assets, including the Assigned Contracts, to BW&P and BM, which are legal entities separate from Bobcat.

Bobcat has provided no basis whatsoever for its position that it has standing to assert claims on behalf of the Interest Holders (including Bobcat) subsequent to the transfers to BW&P and BM. Bobcat cannot assert rights related to the Acquired Assets, including the Assigned Contracts, because it transferred its interest in those assets and contracts to other entities. Thus, this Court finds that Bobcat does not have standing to assert the Admin Claim.

B. Bobcat's Alleged Bases for Asserting the Admin Claim

Bobcat asserts the that it is "both a creditor and representative of other creditors with claims against D & L Energy for post-petition breaches of contract and breaches of fiduciary duty, and for the resulting provision of hydrocarbons and services benefitting the bankruptcy estate." (Claim No. 253-3, Ex. A at 1.) Thus, Bobcat is asserting standing to bring the Admin Claim (i) in

its own right as a creditor; and (ii) as a "representative" of other creditors. The Court will deal with each of these alleged bases for Bobcat's standing, in turn.

1. Bobcat's Standing to Bring its Own Claims

As set forth in the Bobcat Supplement, "Bobcat acquired all of its interests and ownership interests in the entities listed on Exhibit A of the Bobcat brief as part of the Asset Purchase Agreement." (Bobcat Suppl. at 4.) Thus, any rights that Bobcat asserts for itself in the Application are entirely dependent upon the terms of the APA.

There are at least three wholly independent reasons why Bobcat cannot be a creditor of the Debtors' bankruptcy estate in its own right. First, the disclaimer in the APA deprives Bobcat of injury in fact. Second, any alleged pre-closing breach of fiduciary duty constituted a "chose in action," which was expressly defined as an Excluded Asset in the APA. (APA ¶ 1.2.9.) Finally, D & L was both the fiduciary and the beneficiary of the D & L Trust Agreement with knowledge concerning any pre-closing conduct. As discussed below, each reason is independently sufficient to deny Bobcat standing to assert any claims on its own behalf.

i. Disclaimer in Asset Purchase Agreement

As set forth above, in order to have constitutional standing, Bobcat must be able to show proof of injury in fact, causation,

and redressability. The express terms of the APA demonstrate that Bobcat cannot meet these requirements.

The APA contains a broad disclaimer regarding the Acquired Assets. In ¶ 7.1 of the APA, Bobcat expressly acknowledged and disclaimed all warranties and representations concerning the Acquired Assets. This disclaimer broadly encompasses everything that could serve as a warranty or representation concerning the Acquired Assets. Paragraph 7.1 of the APA states,

7.1 Disclaimer. Buyer hereby acknowledges and agrees that, except as specifically stated herein, Sellers make no representations or warranties whatsoever, express or implied, with respect to any matter relating to the Acquired Assets (including, without limitation, income to be derived or expenses to be incurred in connection with the Acquired Assets, the physical condition of any personal or real property comprising a part of the Acquired Assets or which is the subject of any Assumed Executory Contract, the value of the Acquired Assets (or any portion thereof), the location of the Acquired Assets, the transferability of Acquired Assets, the terms, amount, validity, collectability or enforceability of any Assumed Liabilities or Assumed Executory Contracts, the title to or validity or enforceability of any of Sellers' interest in any of the Acquired Assets (or any portion thereof), the merchantability or fitness of the Acquired Assets for any particular purpose, or any other matter or thing relating to the Acquired Assets (or any portion thereof) or the Business. WITHOUT IN ANY WAY LIMITING THE FOREGOING, SELLERS HEREBY DISCLAIM ANY WARRANTY (EXPRESS OR IMPLIED) OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE AS TO ANY PORTION OF THE ACQUIRED ASSETS. Buyer further acknowledges and agrees that it has conducted an independent inspection and investigation of the physical condition of all portions of the Acquired Assets and all such other matters relating to or affecting the Acquired Assets as Buyer deemed necessary or appropriate, and that, in proceeding with its acquisition of the Acquired Assets, Buyer is

doing so based solely upon Buyer's independent inspections and investigations of the Sellers' assets. Accordingly, Buyer will accept the Acquired Assets at the Closing as to their condition "AS IS," "WHERE IS," and "WITH ALL FAULTS."

(APA ¶ 7.1 (emphasis added).)

By way of background, the APA was the second agreement between the parties concerning the Acquired Assets and it represented a compromise of various disputes. RHL originally agreed to purchase certain of the Acquired Assets pursuant to an Asset Purchase Agreement ("First APA") that was approved by the Court on December 9, 2013 pursuant to Order (i) Authorizing the Sale of Substantially All of the Debtors' Assets, Other than Debtors' Interest in the No. 4 Disposal Well, Free and Clear of Liens, Claims, Encumbrances and Interests; and (ii) Granting Related Relief ("First Sale Order") (Doc. 568).¹⁰

The purchase price for the Acquired Assets in the First APA was \$20,700,000.00. (First APA ¶ 2.1.) Instead of closing the sale contemplated by the First APA, on May 30, 2014, RLH filed Complaint for Declaratory Judgment, Adv. Case No. 14-4032 ("Adversary Proceeding"), against the Debtors, in which RLH sought a declaration that (i) the Debtors had materially breached the First APA; (ii) RLH had properly terminated the First APA; (iii) RLH was entitled to return of its deposits in the combined

¹⁰ The First APA is attached to the First Sale Order as Exhibit A.

amount of \$2,470,000; and (iv) other nonspecific damages. As part of that litigation, RHL represented that it had spent more than \$1.05 million in conducting due diligence after entering into the First APA. (Compl. for Decl. J. ¶ 47.)¹¹

Included within the Complaint for Declaratory Judgment were allegations regarding the conduct of Gasearch and insiders of the Debtors. RLH alleged,

84. As another example, RLH discovered the existence of a number of contracts with Gasearch, in addition to the three to which it referred in its March 4, 2014 notice (accepting one and rejecting two). Gasearch is an entity owned and controlled by D&L Energy insiders, Susan Faith and Ben Lupo, and the contracts appear to have been established as the vehicle by which those insiders overcharged investors to their personal benefit.

¹¹ Paragraph 50 of the Complaint for Declaratory Judgment states,

50. RLH very promptly began its due diligence on December 26, 2013; the date that was both the Effective Date of the APA and the beginning of the Due Diligence Period. To that end, RLH retained: (a) Bob Rivkin to provide due diligence consulting services with regard to financial reporting and oil and gas operations; (b) Purple Land Management ("PLM") as its consulting landmen to investigate the various oil and gas leases and other interests; (c) Skelly & Loy to conduct environmental investigations of the assets, including to perform Phase 1 Environmental Site Assessments (as the parties recognized in Sections 3.1.3 and 3.1.6 would be both necessary and appropriate); (d) Advance Resources International, Inc. to conduct engineering assessments and determine the technical feasibility of the salt water injection wells (including to liaise with Ohio Department of Natural Resources ("ODNR") personnel to verify the current status of wells and determine the requirements for restarting the permits); (e) HR Consultants, Inc. to interview Sellers' employees; (f) Integrated Petroleum Technologies, Inc. to inspect the surface facilities of the salt water disposal wells; (g) First American Title Co to provide title reports on the parcels of real property; and (h) Ballard Spahr LLP, to assist in investigating the legal status of various of the assets.

(Compl. for Decl. J. ¶ 50 (emphasis added).)

(*Id.* ¶ 84 (emphasis added).) Thus, at least one of the bases that Bobcat now seeks to assert as a breach of fiduciary duty in the Admin Claim was well known to RLH prior to entering into the APA, which contains the broad disclaimer of all warranties and representations, as well as acceptance of the Acquired Assets "with all faults."

After voluntary mediation concerning the Adversary Proceeding, the Debtors, RLH, and Bobcat negotiated the APA, which is an entirely new agreement. The purchase price in the APA was reduced by almost two-thirds from the First APA to \$7,650,000.00. (APA ¶ 2.1.) The compromise between the Debtors, RLH, and Bobcat was set forth in Joint Motion to Compromise Contract Controversy with Resource Land Holdings, LLC (Doc. 833). With full knowledge of all of the alleged "defects" it asserted in the Adversary Proceeding, RLH decided to purchase the Acquired Assets for the much-reduced purchase price "'AS IS,' 'WHERE IS,' and 'WITH ALL FAULTS.'" (*Id.* ¶ 7.1.) The Debtors made no representations or warranties about the value of the Acquired Assets or the income to be derived or expenses to be incurred in connection with the Acquired Assets. Indeed, any and all warranties and representations were expressly disclaimed. RLH valued the Acquired Assets – based on the income and expenses that had been attributed to each of those entities by D & L in its fiduciary

capacity – and negotiated the purchase price of \$7,650,000.00 as the fair and reasonable value thereof.

By the time the APA was negotiated and signed – nine months after the First APA was signed – Bobcat was intimately familiar with the Acquired Assets. By Bobcat's own admission, it had spent more than \$1 million in due diligence subsequent to entering into the First APA. Indeed, it was this alleged knowledge concerning the Acquired Assets that caused RLH to file the Adversary Proceeding asserting that the Debtors had materially breached the First APA. Armed with this knowledge and information, Bobcat negotiated the APA, which contained a vastly reduced purchase price and the broad disclaimer in ¶ 7.1.

The disclaimer is quite clear that RLH conducted its own inspections and investigations, based on what it deemed necessary and appropriate, not only with respect to the Acquired Assets, but also with respect to all matters relating to or affecting the Acquired Assets. Having made such inspections and investigations, and relying solely thereon, RLH accepted the Acquired Assets “‘AS IS,’ ‘WHERE IS,’ and ‘WITH ALL FAULTS.’” RLH therefore paid the Debtors an amount that it considered fair for the value of the allegedly defective Acquired Assets.

Even assuming, *arguendo*, that the conduct described by Bobcat in the Application and Claim No. 253-3 is accurate, RLH – an affiliate of Bobcat – accepted the Acquired Assets in the form

they existed as of the closing date with all faults. Such faults of necessity included any and all alleged damages relating to or arising from Bobcat's allegations that not all income and expenses had been properly allocated to the entities that comprised the Acquired Assets. If, prior to the closing date, any of the Acquired Assets had alleged causes of action against the Debtors for breach of contract and/or breach of fiduciary duty, all such alleged causes of action were expressly disclaimed. Any and all such causes of action were expressly encompassed within the "ALL FAULTS" pursuant to which Bobcat accepted the Acquired Assets.

Accordingly, the Court finds that Bobcat cannot establish the essential standing element of injury in fact. Based on the express disclaimer, Bobcat does not and cannot establish that it has an injury in fact caused by the alleged breach of fiduciary duty by D & L. Lacking this essential element, Bobcat has no standing to assert any claims for alleged breach of contract or breach of fiduciary duty that may affect the Acquired Assets, including the Assigned Contracts. Bobcat disclaimed all rights to assert an administrative expense claim relating to any of the Acquired Assets – *i.e.*, any of its working interests or ownership interests in any of the joint ventures, LLCs, and PPMs. As a consequence, Bobcat does not have standing to assert any claims for breach of contract or breach of fiduciary duty relating to the Acquired Assets on its own behalf.

ii. Choses in Action Are Excluded Assets in the APA

The APA not only defined the Acquired Assets, it also clearly defined the assets excluded from the sale. Paragraph 1.2 of the APA states:

1.2 Excluded Assets. Notwithstanding anything to the contrary in this Agreement, this sale and the Acquired Assets shall exclude the following assets (collectively, the "Excluded Assets"):

* * *

1.2.9 Sellers' claims, counterclaims, defenses and choses in action that are property of the estate, and any claims or causes of action which a trustee, debtor-in-possession, the estate or other appropriate party in interest may assert under Sections 502(d), 510, 522(f), 522(h), 542, 543, 544, 545, 547, 548, 549, 550, 551, 55 and 724(a) of the Bankruptcy Code, including the Sellers' right of setoff, recoupment, contribution, reimbursement, subrogation or indemnity (as those terms are defined by the non-bankruptcy law of any relevant jurisdiction) and any other indirect claim of any kind whatsoever, whenever and wherever arising or asserted;

(APA ¶¶ 1.2 and 1.2.9.)

As explicitly set forth in the APA, Bobcat did not acquire any rights to D & L Energy's choses in action. Black's Law Dictionary defines a chose in action, as follows:

chose in action. 1. A proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort. **2.** The right to bring an action to recover a debt, money, or thing. **3.** Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit.

BLACK'S LAW DICTIONARY 294 (10th ed. 2009). Any alleged breach of fiduciary duty or breach of contract claim that Bobcat is attempting to assert as the basis for the Admin Claim constitutes a chose in action that was expressly defined as an Excluded Asset in the APA. Accordingly, Bobcat has no standing to include these alleged choses in action for breach of fiduciary duty or breach of contract, as set forth in the Application.

iii. No Breach of Fiduciary Duty to Oneself or When the Beneficiary Ratifies or Consents

A final and wholly separate reason that Bobcat cannot assert any breach of fiduciary duty claims on behalf of entities it purchased as part of the Acquired Assets is that a fiduciary cannot breach a duty to itself.

Bobcat alleges that D & L, as trustee of the D & L Trust Account, breached its fiduciary duties to the various joint ventures, LLCs, and PPMs listed on Exhibit A to the Bobcat Brief. Bobcat's argument regarding fiduciary duties involving the Acquired Assets can be boiled down to its basics: Bobcat alleges that, because of certain post-petition actions by D & L or actions that D & L permitted to happen, the receipts and disbursements from the D & L Trust Account were not in accordance with the management and/or operating agreements. Thus, Bobcat argues it is

owed money due to its working interests or ownership interests in the joint ventures, LLCs, and PPMs.¹²

Bobcat alleges that D & L breached its fiduciary duties by:

- D&L Energy selectively collected joint interest billing ("JIB") receivables owed to the [D & L Trust Account] from joint venture partners, but not from D&L Energy and D&L Energy Insiders.

- D&L Energy used the JIB receivables it collected to pay operating expenses of the wells, which were primarily expense payments due to D&L Energy.

- D&L Energy allowed Gasearch to purchase gas at below market rates and to profit from resales of gas at market and/or retail rates from the Ohio wells in which Atlas, the Everflow Entities, and the joint ventures and PPMs owned working interests.

- D&L Energy paid S&B Investments from the [D & L Trust Account] for working interests in 133 wells in which various joint ventures owned working interests, where S&B Investments had not paid or provided any other consideration for those working interests. As a result, D&L Energy distributed profits to S&B Investments to which it was not entitled and which profits would have otherwise been distributed to the various working interest owners of the joint ventures.

- D&L Energy allowed pipeline companies to use without charge gas from wells in which Atlas, the Everflow Entities and the joint ventures owned working interests, and also to overcharge the wells for transportation charges, compression charges, duplicate charges and invalid expenses not properly charged to the wells.

- D&L Energy granted and paid overriding royalty interests to RF Consulting, in wells that D&L Energy did not own, but only managed and operated. D&L Energy

¹² Exhibit 1 to the Bobcat Supplement, together with the Second Bobcat Supplement, indicates that Bobcat has a "working interest ownership" in 374 of the 518 entities on whose behalf Bobcat purports to bring the Application – *i.e.*, approximately 72 percent of those entities.

granted those interests in settlement of a D&L Energy obligation.

- D&L Energy allowed D&L Energy's principals to make investments in pipeline systems (*i.e.*, Crawford, Mercer, and Bethesda-Meadville) using funds they had looted based on the above through either D&L Energy, Gasearch and/or S&B Investments.

(Bobcat Br. at 2-3.)

Bobcat's claims based on its working interests or ownership interests in the Acquired Assets – *i.e.*, its claims on its own behalf – can only be based on whatever rights Bobcat may have acquired when it purchased the Acquired Assets. All actions that form the basis of the Admin Claim are based on alleged conduct by D & L during the post-petition period of time prior to the closing of the APA. At all such times the Acquired Assets were then wholly owned by D & L. As a consequence, D & L was both the fiduciary of the D & L Trust Account and the owner of the Acquired Assets – *i.e.*, a beneficiary of the D & L Trust Agreement.¹³ Thus, Bobcat's allegations regarding the claims it attempts to assert on behalf of the Acquired Assets must – of necessity – be that D & L breached a fiduciary duty to itself.

¹³ The D & L Trust Agreement defines D & L as the "Trustee" and D & L as the "Manager/Grantor" "desiring to create a trust (the "Trust") for the benefit of those certain oil and gas joint venture partners, landowners, participants, or overriding royalty owners maintained in the Manager/Grantor's data base (collectively the "Beneficiaries" and sometimes referred to individually as a "Beneficiary") (D & L Trust Agreement at 1.) Thus, to the extent the entities comprising the Acquired Assets were beneficiaries of the D & L Trust Account, D & L was the settlor, trustee, and beneficiary of the D & L Trust Account.

A fiduciary cannot breach a duty when the beneficiary has ratified or consented to the conduct of the fiduciary. The Ohio Revised Code provides,

A trustee is not liable to a beneficiary for breach of trust if the beneficiary or the beneficiary's representative under the representation provisions of Chapter 5803. [sic] of the Revised Code consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless the consent, release, or ratification of the beneficiary or representative was induced by improper conduct of the trustee or, at the time of the consent, release, or ratification, the beneficiary or representative did not know of the beneficiary's rights or of the material facts relating to the breach.

This section applies regardless of whether the conduct being consented to, released, or ratified constitutes one or more breaches of fiduciary duty, violates one or more provisions of the Revised Code, or is taken without required court approval.

O.R.C. § 5810.09 (2016).

In *May v. Copeland*, 947 N.E.2d 1239 (Ohio Ct. App. 2010), an Ohio Court of Appeals noted the following:

R.C. 5810.09 is analogous to Section 1009 of the Uniform Trust Code which, in turn, is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). Section 216 of the Restatement of Trusts states, in relevant part, as follows: "(1) Except as stated in Subsections (2) and (3), a beneficiary cannot hold the trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary prior to or at the time of the act or omission consented to it.

Id. ¶ 54.

D & L, as a working interest holder in or owner of the entities that comprise the Acquired Assets, necessarily was aware of and

consented to D & L's disbursements regarding income into and expenses from the D & L Trust Account. At all times, D & L (as beneficiary) (i) was aware of the actions, conduct, and disbursements for which D & L (as trustee) was responsible; and (ii) either ratified or consented to such actions and conduct regarding income and expense disbursements from the D & L Trust Account. As a consequence, D & L, as a working interest holder in or owner of the entities that constitute the Acquired Assets, would not – as a matter of law – be able to assert any breach of fiduciary duty against itself. Bobcat does not and cannot have any greater rights in the Acquired Assets than existed at the time of transfer. Bobcat's creation of the Bobcat Trust Agreement with itself as trustee does not and cannot create the breach of fiduciary duty rights it seeks to enforce regarding the Acquired Assets.

For this third and independent reason, Bobcat cannot establish that it has an injury caused by the alleged breach of fiduciary duty by D & L. As a consequence, Bobcat does not have standing to assert breach of fiduciary duty claims on behalf of itself as owner of the Acquired Assets.

2. Bobcat's Standing in a Representative Capacity

Having found that Bobcat does not and cannot have standing to bring the Admin Claim on its own behalf, the Court will next examine whether Bobcat has standing to assert the Admin Claim as the authorized representative of any third party. Bobcat cannot

base the Admin Claim on the simple assertion that D & L's alleged breach of fiduciary duty injured Everflow, Atlas, the JV Responders, and other interest holders. Bobcat must have standing to assert the Admin Claim on behalf of those third parties. As previously noted, the Supreme Court has held that "the plaintiff generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (citations omitted).

As the Trustee aptly notes, Bobcat's arguments in support of its standing "can only come from one of the following sources: (1) Ohio statutory trust and partnership law; (2) the relevant joint venture and operating agreements; or (3) some other affirmative contractual consent." (Trustee Br. at 3.) Bobcat has failed to establish standing on any of these bases.

i. Express or Implicit Consent

Because it is the easiest to dispose of, the Court first will deal with whether any of the third parties in question have provided affirmative consent to Bobcat pursuing the Admin Claim on their behalf. Quite clearly, the answer is no. Moreover, all third parties disavow that their silence constitutes consent for Bobcat to act on their behalf.

Bobcat argues, "By their silence on pursuing claims to properly fulfill their obligations, and the negative pregnant

clauses concerning settlement of claims, [the Atlas Agreement and Everflow Agreement] authorize Bobcat to bring a claim or suit arising out of its operations of the wells and the Atlas and/or Everflow Entities' working interests." (Bobcat Br. at 20 (citation and parenthetical omitted).)

Bobcat relies entirely on "negative pregnant clauses." Bobcat has not pointed to and cannot point to any specific authorization given to it in any agreement to pursue complex litigation or claims on behalf of any of the third parties in question. Bobcat relies on its "reasonable reading" of certain provisions and negative implications in the agreements for its alleged standing. For example, Bobcat states that, since it has the right to settle claims for de minimis amounts (no more than \$5,000.00 in any agreement), it must be authorized in the first instance to pursue claims on behalf of the third parties. Bobcat's reasoning regarding this extensive authority, however, is overreaching. First, nowhere is Bobcat authorized to pursue claims – in any amount – without the consent of the third parties. Authorization to settle claims for de minimis amounts is not the same as authorization to pursue claims on behalf of the third parties. Moreover, where Bobcat has been designated to act as representative, specified actions are permitted or prior consent is required before Bobcat can take action as operator or manager. See, e.g., p. 17-21 *supra*.

Bobcat's argument regarding silence as consent is also not availing. Regarding Bobcat's assertion that Everflow ratified Bobcat's filing the Admin Claim, Everflow states unequivocally,

Finally, Bobcat meekly argues that the Everflow Entities' purported silence somehow establishes its authority to bring these claims, or in some way ratifies its actions. The Everflow Entities' Original Precautionary Limited Objection belies this position. To the extent the Everflow Entities did not previously object or oppose Bobcat's actions, it is because they did not know what was going on. Once the Everflow Entities were made aware of the situation, they immediately filed a response. And in that response, the Everflow Entities "reserved[d] their right to weigh in on the standing issue" And to be absolutely clear, the Everflow Entities do not approve of the actions taken by Bobcat.

(Everflow Br. at 6 (citation omitted) (emphasis added).)

Atlas likewise takes the position that its silence does not constitute its consent for Bobcat to act on its behalf.

The Bobcat Brief also improperly implies that Atlas has acquiesced and ratified Bobcat's efforts to pursue these claims. Rather, on its own volition, Bobcat unilaterally investigated these claims and filed the [Application] on October 6, 2015. Bobcat did not advise Atlas of its investigatory actions for six weeks, until Bobcat sent Atlas a letter on November 17, 2015. . . . Instead of discussing the possibility of asserting claims against the debtors or other third parties, Bobcat simply took action and then attempted to charge Atlas for its efforts.

(Atlas Br. at 3.)

The JV Responders also disclaim that they have consented to Bobcat bringing the Admin Claim on their behalf, "Bobcat does not have standing to assert claims on behalf of JV Responders pursuant

to joint venture agreements, management agreement, or operating agreements." (JV Responders Br. at 16.)

Bobcat further argues that a number of other third parties have consented to Bobcat bringing the Application:

No joint venturer / program participant has challenged Bobcat/s [sic] rights to represent the joint ventures, and their joint venture partners. Those interested parties' representatives received notice in this case as to how Bobcat was proceeding with respect to the claims on behalf of their interest in the [Bobcat Trust Agreement trust account] and the joint ventures. In the putative class action to which the Trustee has directed this Court's attention, the claims asserted are ones brought on behalf of a class defined as: "All non-operator joint venturers in the joint ventures identified in Paragraphs 1 - 12 who have not received all required distributions from Defendants of the revenues generated by the wells owned by the joint ventures)". [sic] *JLXX Corp. et al. v. Bobcat Energy Resources, LLC et al.*, Case: 4:15-cv-01993 (N.D. Ohio), Dkt. no. 9, ¶ 26. The law firm of Harrington, Hoppe & Mitchell represents the named plaintiffs and the proposed class, and that law firm has been on the list of parties receiving notice with respect to every part of the D&L energy proceedings Bobcat discusses above.

(Bobcat Br. at 23.)

It is not convincing to the Court that the lack of response to Bobcat's standing regarding the Admin Claim in any way constitutes consent. Rather, the lack of response could simply indicate that the recipients of the copious electronic notices in this case simply did not recognize that Bobcat's Application in any way affected their interests. First, Bobcat has admittedly taken inconsistent positions regarding its relationship to those third parties in the District Court Litigation and in this Court.

Second, the law firm representing the putative class of third parties in the District Court Litigation is not a party to any contested matter in this Court, but receives notices only. It is unreasonable for Bobcat to take the position that the lack of a response to its Application is an indication of consent. At the time Bobcat filed the Application, there were more than 1,500 docket entries in this case and most parties receive notice electronically for noticing purposes only. There was no reason for any party other than the Trustee to look closely at an application for payment of an administrative expense claim.

As a consequence, this Court finds that Bobcat's standing cannot rest on the consent – affirmative or implied – to pursue claims on behalf of Everflow, Atlas, the JV Responders, or any other third party.

ii. Statutory Law and Bobcat Trust Agreement

Bobcat relies on O.R.C. § 5808.11 as the statutory authority for its standing to pursue claims on behalf of the Bobcat Trust Account. (Bobcat Br. at 18-19.) That statute provides, "A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust."¹⁴ O.R.C. § 5808.11 (2016). There

¹⁴ The Official Comment to this section provides,

This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. See

is nothing in this statute that creates a right or obligation for a trustee to pursue claims on behalf of the individual beneficiaries of the trust. The trust must possess such claims independent of the statute. Furthermore, the trustee can only take reasonable steps to enforce the claims of the trust itself.

Bobcat states, "Both the express provisions of the BPTA and the Ohio statute confer standing on Bobcat to pursue these claims for monies owed the new BPTA." (Bobcat Br. at 19.) Bobcat begins its brief as follows:

In this brief, Bobcat will demonstrate its standing to pursue the claims for amounts improperly paid or withheld from the D&L Energy Production Trust Account ("D&LPTA"), and to do so on behalf of Atlas, the Everflow Entities, and the joint ventures, LLCs and PPMs.

The D&LPTA is the bank account in which D&L Energy deposited revenues received on behalf of Atlas, the Everflow Entities, the joint ventures, LLCs and PPMs. From that account, Bobcat pays or reserves for expenses, and distributes any distributable net income. The D&LPTA was not before the Closing, and is not after the Closing, property of the D&L Energy estate.

(*Id.* at 1 (emphasis added).) "When Bobcat established the BPTA it was underfunded because of monies D&L Energy and D&L Energy's insiders improperly diverted from the predecessor production trust account that D&L Energy operated ("D&LPTA"). It is Bobcat's

also Section 816(14) (power to pay, contest, settle, or release claims).

O.R.C. § 5808.11 official comment.

fiduciary duty to seek the monies that should have been in the BPTA." (Bobcat Atlas Reply at 2-3.)

There is a fatal flaw in Bobcat's syllogism. The problem with this argument is that the D & L Trust Account owes no monies to the Bobcat Trust Account. Bobcat is not now and has never been authorized to do anything with the D & L Trust Account. Bobcat cannot distribute or reserve for expenses any income from the D & L Trust Account.

Bobcat is partially correct in that the funds in the D & L Trust Account are not and never were property of the Debtors' bankruptcy estate. Neither the D & L Trust Account nor the funds therein were encompassed within the Acquired Assets or even dealt with in the APA. As a result, Bobcat did not and could not, as a matter of law, acquire any interest in or rights to distribute or reserve amounts from the D & L Trust Account as a result of any Court order regarding the sale of the Acquired Assets or approval of the APA.

The Trust Account Order, which remains in full force and effect, is the only order of this Court that authorizes any party to deal with the D & L Trust Account. The Trust Account Order provides,

3. Pursuant to sections 105(a) and 363 of the Bankruptcy Code, the Debtors are authorized and empowered to: (a) designate, maintain and continue to use the productions trust account at Huntington National Bank, account number ending in 2669, (the "Trust

Account") and (b) continue to use Debtors' existing checks and other business forms related to the Trust Account upon adding the designation "debtor-in-possession" and the bankruptcy case number to all checks issued from the account.

* * *

5. Huntington National Bank ("HNB") is hereby authorized to continue to service and administer the Trust Account as an account of the Debtors, in their capacity as debtors in possession, without interruption and in the usual and ordinary course, and to receive, process, honor and pay any and all checks, drafts, or automated transfers (the "Transfers") issued on the Trust Account; *provided, however*, that sufficient funds, whether deposited prior or subsequent to the Petition Date, are in the Trust Account to cover and permit payment thereof.

* * *

7. This Order is without prejudice to the Debtors' rights to (a) close the Trust Account or (b) open or close accounts other than the Trust Account at any other banking institution.

* * *

13. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

(Trust Acct. Order ¶¶ 3, 5, 7, 13.)

Pursuant to the Trust Account Order, the Court expressly authorized only the Debtors to manage and use the D & L Trust Account. Subsequent to the Debtors' conversion of this case to chapter 7, the Trustee – and only the Trustee – succeeded to the rights of the Debtors as debtors in possession. As Bobcat

acknowledges, the D & L Trust Account was not included in the APA and certainly did not constitute any part of the Acquired Assets.

Nor did Bobcat acquire any interest or rights in the D & L Trust Account by way of any of the Assigned Contracts encompassed within the Acquired Assets. As Bobcat acknowledges, the agreement that created the D & L Trust Account was not part of the Assigned Contracts. Nor do any of the Assigned Contracts provide for D & L's designation, maintenance, or continued use of the D & L Trust Account, as was permitted by the Trust Account Order. None of the Assigned Contracts gave Bobcat any right to use, oversee, or make distributions from the D & L Trust Account.

Because Bobcat had no rights to or interest in the D & L Trust Account, Bobcat was required to and did, in fact, create the Bobcat Trust Account to perform its news obligations under the Assigned Contracts. As explained in the Bobcat General Reply,

As Bobcat's opening brief points out, when Bobcat assumed what had been D&L Energy's role as the manager and operator of various wells, Bobcat also became responsible for the management of the revenue streams and expenses for those wells. Included in those responsibilities is the fiduciary obligation to manage, maintain and operate the new Production Trust Account, or BPTA. As part of its fiduciary responsibilities, Bobcat started that new account on December 1, 2014, the Closing Date for its acquisition of the Acquired Assets under the Public Sale APA. [Doc. No. 1044, Exh. 1].

Bobcat also pointed out that, through November 30, 2014, D&L Energy had operated and maintained a production account, or the D&LPTA" [sic], and had done so on behalf of Atlas, the Everflow Entities, and the joint ventures, LLCs and PPMs. The D&LPTA was the bank

account in which D&L Energy deposited revenues received on behalf of Atlas, the Everflow Entities, and the joint ventures, LLCs and PPMs. From that account, D&L Energy paid (or was to have paid) or reserved (or was to have created reserves) for expenses, and then distributed any distributable net income owed.

The D&LPTA was at all times what D&L Energy labeled a "flow-through" account that it operated and maintained for the benefit of the beneficiaries. It was not property of the D&L Energy estate.

(Bobcat Gen. Reply at 2.)

Bobcat's obligations pursuant to the Bobcat Trust Agreement may inure to the same entities as the beneficiaries of the D & L Trust Agreement and may entail the same actions that D & L undertook pursuant to the D & L Trust Agreement, but Bobcat's obligations are not the same as nor are they a continuation of D & L's obligations. As stated ad nauseam, the D & L Trust Account was not an Acquired Asset and the D & L Trust Agreement governing the operation of such account was not an Assigned Contract. If and to the extent at the time of the closing of the APA there were any funds in the D & L Trust Account, only the Debtors – and later the Trustee – were authorized to account for and distribute such funds. Bobcat never had any fiduciary duties with respect to such funds because it was never the trustee of the D & L Trust Agreement.

Next, Bobcat states that, as the fiduciary responsible for the Bobcat Trust Account, "Bobcat is charged with the duty and responsibility to collect and protect the corpus of that account, or the Trust Property." (Bobcat Br. at 18 (citations omitted).)

Bobcat then defines "Trust Property," as allegedly set forth in the Bobcat Trust Agreement, as: "'any and all payments arising out of each Beneficiary's interest in certain oil and gas well joint ventures, oil and gas leases, and/or oil and gas overriding royalty agreements' with D&L Energy." (*Id.* (quoting Bobcat Trust Agreement at 4 ¶ 2).) Bobcat's definition of the Bobcat Trust Agreement "Trust Property," however, is disingenuously inaccurate. Bobcat not only does not recite the Bobcat Trust Agreement's full definition of Trust Property, Bobcat adds the words "with D&L Energy," which are not part of that definition.

The Bobcat Trust Agreement defines Trust Property as follows:

2. Trust Property. The Manager/Grantor, desiring to create a new trust beginning December 1, 2014 (the "Trust") for the benefit of the Beneficiaries, revocably assigns to the Trustee any and all payments arising out of each Beneficiary's interest in certain oil and gas leases, oil and gas well joint ventures, oil and gas overriding royalty agreements, and/or operating agreements with the Manager/Grantor (the "Trust Property"), in trust, for the purposes and on the conditions stated in this Trust Agreement.

(Bobcat Trust Agreement ¶ 2 (emphasis added).) BW&P and BM, collectively, are the "Manager/Grantor" of the Bobcat Trust Agreement and Bobcat is the "Trustee." (*Id.* at 1.) Moreover, "Beneficiaries" are "the owners of wells and pipelines that BWP manages and operates, and the beneficiaries of those oil and gas well joint ventures, oil and gas leases and/or oil and gas overriding royalty agreements." (*Id.* at 3.) Bobcat's omissions

and additions are significant in advancing Bobcat's argument concerning what is owed to the Bobcat Trust Account; however, these changes do not reflect, but instead greatly alter, the true definition of Trust Property and, thus, the claims Bobcat alleges it has standing to pursue.

Despite Bobcat's clever attempt to obnubilate the issues, the Bobcat Trust Agreement simply does not confer standing on Bobcat to assert the Admin Claim. The Trust Property for which Bobcat is trustee does not include any entity's agreements with D & L, but instead includes only the agreements that the Beneficiaries have with Bobcat, BW&P, or BM. Bobcat's attempt to redefine Trust Property in the Bobcat Trust Agreement to encompass agreements the Beneficiaries formerly had with D & L Energy is troubling, but not effective to create standing on behalf of Bobcat through the Bobcat Trust Agreement. Even if the beneficiaries of the D & L Trust Agreement are the same entities as the beneficiaries of the Bobcat Trust Agreement, their rights are governed by two separate trust agreements and distinct contractual rights that the beneficiaries may be entitled to assert or enforce. Bobcat's disingenuous misstatement of the definition of Trust Property does not and cannot create standing for itself as trustee of the Bobcat Trust Agreement to assert rights on behalf of third parties who formerly were parties to the D & L Trust Agreement.

If and to the extent there are or may be alleged breaches of fiduciary duty by D & L in performing its obligations under the D & L Trust Agreement, those obligations do not and cannot inure to the new Bobcat Trust Agreement. Bobcat established the Bobcat Trust Agreement concurrent with the closing of the sale of the Acquired Assets. Bobcat has wholly failed to articulate how or why it believes it should have claims against the Debtors' estates based on Bobcat's obligations regarding its own trust agreement. Although not articulated well, Bobcat's argument appears to be that, funds are allegedly owed to beneficiaries of the D & L Trust Agreement; accordingly, those funds are required to be turned over to the Bobcat Trust Account, after which Bobcat would have a fiduciary duty to distribute the funds in the Bobcat Trust Account in accordance with the terms of the Bobcat Trust Agreement. Bobcat has cited nothing to show that the D & L Trust Account owes any monies to the Bobcat Trust Account. Nor has Bobcat pointed to any document or statute that creates a monetary obligation on behalf of the D & L Trust Account to the Bobcat Trust Account.

Accordingly, O.R.C. § 5808.11 does not create standing or serve as a basis in support of Bobcat's assertion of standing pursuant to the Bobcat Trust Agreement.

iii. JV, Everflow, and Atlas Agreements

Bobcat asserts that it has standing to bring the Admin Claim as assignee of the Acquired Assets and, more specifically, the

Assigned Contracts. (Bobcat Br. at 10-18.) Bobcat's Brief sets forth D & L's prior duties under the Assigned Contracts, as explained by D & L in the Omnibus Assignment Motion (*id.* at 14-16), and asserts, "Each of these duties and responsibilities, whether undertaken as manager or operator, were ones [sic] D&L Energy conducted through the mechanism of the D&LPTA, and ones [sic] that Bobcat has conducted and continues to conduct through the new BPTA (albeit Bobcat is not doing so in the same manner as D&L Energy did up to the Closing)" (*id.* at 16). Bobcat states the obvious when it contends that it has the same obligations under the Assigned Contracts that D & L had prior to assumption and assignment thereof, because – after all – the Assigned Contracts remain unchanged except for the parties whose performance is now required.

However, assignment of the Assigned Contracts to Bobcat does not independently create standing for Bobcat to assert claims on behalf of the JV Responders, Everflow, and/or Atlas. To the contrary, the Assigned Contracts themselves must authorize the standing that Bobcat is attempting to assert. As set forth below, the Assigned Contracts do not provide such authorization.

The Court will first address the JV Agreement, upon which Bobcat purports to bring the Admin Claim on behalf of the joint ventures, LLCs, and PPMs. The Court will then address the Everflow Agreement and conclude by addressing the Atlas Agreement.

a. JV Agreement

In its brief, Bobcat states, "The D&L Energy standard-form joint venture agreements" – e.g., the JV Agreement – "authorize Bobcat, as manager, to act as agent for the venture and to be 'responsible for the overall supervision of the operation of the well(s).'" (Bobcat Br. at 21 (citations omitted).) The JV Agreement, as defined *supra* at 9-10, includes both (i) DL Joint Venture Certificate and Agreement of Joint Venture ("Certificate") (Doc. 1197, Ex. B., Ex. 1 at 8-14); and (ii) DL Joint Venture Operating Agreement ("Operating Agreement") (*id.* at 15-19). The Court will address each of these agreements in succession.

First, the Certificate does not – either expressly or implicitly – authorize Bobcat, as the "Manager," to assert the Admin Claim on behalf of the "Joint Venture" and/or "Co-Venturers." The above-referenced quote regarding Bobcat acting as agent for the Joint Venture, which is the only language in the JV Agreement quoted by Bobcat, is from the following provision in the Certificate:

1) With, and only with, the authority and approval as provided in Paragraph 4 of this Agreement, Manager shall act as the "Agent" of the Joint Venture and shall be responsible for the overall supervision of the operation of the well(s), and for acting as such, Manager agrees that it shall act in consideration of the compensation as provided in Paragraph 8 herein.

(Cert. ¶ 1 (emphasis added).) The Certificate grants Bobcat further authorization to act on behalf of the Joint Venture as follows:

2) (a) With, and only with, the authority and approval as provided in Paragraph 4 of this Agreement, Manager as Agent, shall be responsible for the hiring of the necessary parties and professional services in connection with this Agreement, the cost of such services to be paid directly by the Joint Venture. The Manager shall oversee the income and distribution of monies as hereinafter outlined.

* * *

(*Id.* ¶ 2(a) (emphasis added).) Bobcat's duties and corresponding authority to act on behalf of the Joint Venture, as set forth in ¶¶ 1-2 of the Certificate above, are further explained in ¶ 3:

3) For purposes of carrying out the duties and responsibilities as provided in Paragraphs 1 and 2 above, and with respect to the operation and supervision of the producing well(s) and of the leasehold estate(s), the Co-Venturers, as part owners of the working interests in the above-described lease(s), do hereby nominate, constitute, and appoint Manager as their agent, representative, and attorney-in-fact to act for and on their behalf, granting to Manager the right of operation and supervision for the following acts that are ancillary to said operation, conditioned upon and with the approval and authority as provided in Paragraph 4 hereinbelow:

(i) To enter into any and all contracts and execute such documents necessary on behalf of the Joint Venture for the formation, development, care and maintenance of the well(s);

(ii) To hire and pay labor; to pay all development, completion, and production expenses of all well(s) on the acreage; to incur and pay all bills for equipment and materials and the expenses necessary for the efficient and continuous

operation of subject well or well(s), such expenses to include premiums for insurance (Workers' Compensation, liability and fire), fuel, trucking, and taxes (excluding the personal income taxes of the Manager and Co-Venturers); and

(iii) To receive the statements, claims, and charges for the care of the well(s), land damages, taxes, insurance, royalties, and other statements, claims and charges rendered against the subject well(s) and to determine the correctness thereof.

It is understood and agreed by Co-Venturers that said authority and approval to be provided to Manager, as agent, representative and attorney-in-fact, may be oral or in writing as circumstances dictate, however, if the authority or approval is granted to Manager verbally, Manager, as agent and representative, may request from Co-Venturers, and if requested, Co-Venturers shall give written acknowledgement and ratification in a form acceptable to Manager of such approval.

(*Id.* ¶ 3 (emphasis added).) In no way do these provisions, individually or collectively, authorize Bobcat on behalf of the Joint Venture or Co-Venturers to assert claims against third parties for breach of fiduciary duty or otherwise. Rather, these provisions deal with the development and operation of oil and gas wells and the tasks attendant thereto.

The approval necessary for Bobcat to act on behalf of the Joint Venture pursuant to ¶¶ 1-3 of the Certificate is entirely ignored by Bobcat in its pleadings. That provision - *i.e.*, ¶ 4 of the Certificate - provides as follows: "Manager, on behalf of itself and the Joint Venture, after consultation with Co-Venturers, where it deems appropriate and necessary,

shall:" (*Id.* ¶ 4 (emphasis added).) The eight functions of the Manager listed in ¶ 4 can be summarized as follows:

1. Comply with and carry out the duties in the lease agreements;
2. Hire petroleum engineers and geologists;
3. Receive and verify payments made to the Joint Venture and distribute payments to Co-Venturers;
4. Obtain permits and approvals from governmental agencies and lessors;
5. Make arrangements for the sale of oil and gas produced from the wells;
6. Comply with the filing and reporting requirements of governmental agencies;
7. Review and enter into an operating agreement appointing D & L as operator; and
8. Review and pay for all expenses for the development and operation of the wells.

(*Id.*) Paragraph 4 requires the Manager to consult with the Co-Venturers, and then, after consultation, allows Bobcat to perform the eight functions set forth above. All of these functions relate to the enumerated rights and responsibilities of the Manager set forth in ¶¶ 1-3 of the Certificate, which in turn all relate to the "supervision and operation" of oil and gas wells. These provisions do not grant Bobcat the authority to pursue the Admin Claim for breach of fiduciary duty, which is well outside the scope and purpose of the Joint Venture. Moreover, for the sake of argument only, the Certificate would mandate Bobcat's consultation

with the Co-Venturers before commencing such complex litigation, which has not been alleged by Bobcat.

Paragraph 8 of the Certificate includes the only reference to "legal work," which is very limited:

(c) It is understood that operating expenses of the Joint Venture shall include, but may not be limited to, administrative items and costs such as insurance costs, permits, lease acquisition, survey, title work, legal work, all other administrative costs and all costs attributable and pertinent to the organization and operation of the Joint Venture."

(*Id.* ¶ 8(c) (emphasis added).) Because the reference to costs for "legal work" is included within "administrative items and costs" attributable to the "organization and operation of the Joint Venture," such legal costs can only fairly be read to mean legal costs associated with the basic operations of the Joint Venture – the supervision and operation of oil and gas wells. This provision cannot reasonably be interpreted to include the Manager's attorney fees or costs to pursue claims for breach of fiduciary duty on behalf of the Joint Venture and/or Co-Venturers.

Significantly, ¶ 12 of the Certificate provides that the designation of D & L as Manager for the Joint Venture was for purposes of good management and efficiency of operation.

12) It is understood, agreed, and represented by the parties hereto that, since either or any of the parties are capable of conducting or supervising an oil and gas drilling operation and development venture, the designation of a manager of the Joint Venture is for purposes of good management and efficiency of operation, and that any profitable or successful operation

conducted hereunder shall be the result of the efforts of all of the parties hereto and that each party hereto shall be deemed to have management participation and control of the Joint Venture such that the execution of this document and any supporting documents necessary in connection herewith shall not be considered the sale or issuance of a security.

(*Id.* ¶ 12.) Because the agreement expressly states that each Co-Venturer was in as good of a position to fulfill the duties of Manager as D & L – described therein as “conducting or supervising an oil and gas drilling operation and development venture” – there is no implication that the Manager was invested with responsibilities that were not expressly stated in the Certificate. Thus, the parties’ express references to good management and efficiency limit, rather than expand, the authority of the Manager. The Certificate does not include implied authority for the Manager to pursue matters for the Joint Venture and/or Co-Venturers that are not specified therein.

Finally, despite Bobcat’s arguments to the contrary regarding “negative pregnant clauses,” the law does not require an agreement to set forth each and every action an agent for the contracting parties is not authorized to perform. Instead, the law requires an agreement to specify the actions, rights, and obligations to which the parties actually agree. Accordingly, the Court finds that the Certificate cannot be construed to confer standing upon Bobcat to maintain the Admin Claim.

Next, the Operating Agreement does not – either expressly or implicitly – authorize Bobcat, as the “Operator,” to assert the Admin Claim on behalf of the “Non-Operators.” Although Bobcat does not specifically quote or cite any portion of the Operating Agreement to support its standing to bring the Admin Claim, the Operating Agreement provides,

(1) The leasehold estates . . . shall be operated for the production of oil, gas and casinghead gas by . . . Operator, under the terms of this Agreement for the joint benefit of the parties hereto in the proportions of their interest in DL Joint Venture - (hereinafter the “Joint Venture”) as set forth in the Certificate and Agreement of Joint Venture to which this Agreement is attached. Operator shall have full and exclusive control and supervision of all development and operations of said lands and leases for the production of oil, gas and casinghead gas subject to the terms of this Agreement, in good faith, and in accordance with its best business judgment.

(Operating Agreement ¶ 1.) The Operating Agreement further states that “Operator shall furnish to Non-Operators monthly statements of income and expenditures covering each well” (*Id.* ¶ 5.)

Paragraph 15 of the Operating Agreement is the only provision that deals with any type of claims; however, this provision is very limited in nature. Paragraph 15 grants the Operator the right to “compromise, settle and adjust any claim for damages which may be made by the landowner or adjoining landowners, which damage may result from any operations conducted in the developing, or operation on said oil and gas leases or drilling unit(s)” (*Id.* ¶ 15.) Significantly, this provision makes no mention of the

Operator filing and pursuing claims and only pertains to claims made by landowners. Clearly, this paragraph does not contemplate nor encompass the standing that Bobcat is attempting to assert.

Accordingly, the Court finds that the Certificate and Operating Agreement, both independently and in conjunction with one another, do not support Bobcat's purported standing to pursue the Admin Claims simply because Bobcat "is the authorized representative of the working interest owners of the wells and is both authorized and entitled to act on their behalf" (Bobcat Br. at 3).

b. Everflow Agreement

In the Everflow Agreement, D & L is defined as the "Operator" and Everflow Eastern Partners, LP is defined as the "Owner." (Everflow Agreement at 1.) Bobcat acknowledges that "[t]he Everflow Entities' operating agreement specifically states that it does not create a joint venture or commercial partnership." (Bobcat Br. at 19.) However, Bobcat insists that the Everflow Agreement provides Bobcat with "sweeping powers with respect to the management of the wells and the working interests the Everflow Entities hold in those wells." (*Id.*) Bobcat quotes portions of the following provisions in the Everflow Agreement to demonstrate the breadth of Bobcat's rights, responsibilities, and obligations pursuant thereto:

3. Owner constitutes and appoints Operator its true and lawful attorney to operate the Well for it and in its stead. Except as provided below, Owners reserves the right separately to take in kind or to dispose of its share of oil and gas. Operator is authorized to contract on behalf of Owner for the sale of oil and gas produced from the Well for the minimum period of time established by the industry for marketing oil and gas under the same or similar circumstances.

4. Operator shall have the right to receive the revenues from the sale of the oil and gas produced from the Well and shall cause to be paid out of said revenues all expenses incurred in the development and operation of the Well, including all royalty interests, overriding royalty interests, taxes, gas transportation fees, gathering fees, Well Supervision Fees, services, material, and other operating expenses which, in the judgment of Operator, are necessary for the proper operation and management of the Well and the marketing of any oil and gas produced therefrom. . . .

5. It is the intent of Operator and Owner to closely monitor the expenses incurred in the operation of the Well, and anything contained herein to the contrary notwithstanding, Operator shall not undertake, without the prior written consent of Owner.

(a) To settle any single damage claim or suit arising from operations hereunder in excess of \$5,000 (any such payment not in excess of \$5,000 must be in complete settlement of such claim or suit); and

(b) To commence any single project for a Well reasonably estimated to require an expenditure in excess of \$5,000; provided, however, that in case of explosion, fire, flood, other similar emergency, Operator may take such steps and incur such expense as in its opinion are required to deal with the emergency, and to safeguard life and property. In such emergency, Operator shall thereafter promptly report the nature of the emergency and the action taken to Owner and shall be entitled to recover from Owner the expenses incurred in connection with dealing with such emergency.

Operator shall have the right to settle any claim for overcharges, penalties or interest which may result from any oil and gas sales and Owner agrees to pay Owner's share of such overcharges, penalties, or interest, if Owner has received the benefit of such overcharges, penalties or interest.

6. Operator shall furnish monthly to Owner a report setting forth the expenses and revenues of each Well for the preceding period. . . . [(Everflow Agreement, ¶¶ 3-6.)]

(Bobcat Gen. Reply at 16-17.) The portions of the Everflow Agreement quoted by Bobcat are underlined for emphasis.

Bobcat claims that, by appointing Bobcat its attorney in fact and authorizing Bobcat to collect revenues and pay expenses, Everflow "necessarily authorized Bobcat to act in [its] stead and to collect those amounts by any reasonable means necessary." (*Id.* at 17) (citation omitted).) Bobcat explains,

And, after appointing Bobcat as its attorney-in-fact and granting it broad powers to act with respect to revenues and expenses, it is important to note that in those few restrictions the Everflow Entities did impose, they did not make any provision that would restrict actions to collect revenues and litigation to collect revenues.

(*Id.* (emphasis added).) Furthermore, Bobcat contends, "By their silence on pursuing claims to properly fulfill their obligations, and the negative pregnant clauses concerning settlement of claims, [the Everflow Agreement and the Atlas Agreement] authorize Bobcat to bring a claim or suit arising out of its operations of the wells and the Atlas and/or Everflow Entities' working interests." (Bobcat Br. at 20 (citation and parenthetical omitted).)

First and foremost, Everflow's appointment of Bobcat as its attorney-in-fact was solely "to operate the Well for it and in its stead." (Everflow Agreement ¶ 3 ("Owner constitutes and appoints Operator its true and lawful attorney to operate the Well for it and in its stead.")) The only other authority referenced in that provision of the Everflow Agreement grants Bobcat the power to "contract on behalf of Owner for the sale of oil and gas" (*Id.*) After ignoring the fact that it is Everflow's attorney-in-fact only in relation to the operation of the oil and gas wells, Bobcat states that such attorney powers, in conjunction with its authority to "collect revenues and pay expenses" (Bobcat Gen. Reply at 17), "necessarily authorize[] Bobcat to act in [Everflow's] stead and to collect those amounts by any reasonable means necessary" (*id.*). Bobcat misstates the facts and grossly overstates its authority. In referencing "those amounts," Bobcat means claims for alleged breach of fiduciary duty brought by Bobcat as current Operator against D & L as former Operator. However, Bobcat again ignores the fact that its "broad powers to act with respect to revenues and expenses" are simply "the right to receive the revenues from the sale of the oil and gas produced from the Well" and disburse such revenues after paying operating expenses "necessary for the operation and management of the Well and the marketing of any oil and gas produced therefrom." (Everflow Agreement ¶ 4 (emphasis added).) Bobcat's authority to act as

attorney-in-fact to operate the wells, collect revenues from the sale of oil and gas, and pay operating expenses related to the operation of the wells in no way authorizes Bobcat to bring a claim for breach of fiduciary duty against a former Operator.

In discussing its authority to settle claims pursuant to ¶ 5 of the Everflow Agreement, Bobcat again exhibits its selective reading of the Assigned Contracts. Bobcat states, "In [the Everflow Agreement], the only mention of claims is a direction that Bobcat may not 'settle any single damage claim or suit arising from operations hereunder over \$5,000' without the Everflow Entities' permission." (*Id.* (quoting Everflow Agreement, ¶ 5(a).) However, settlement of any claim in excess of \$5,000.00 requires the "prior written consent" of Everflow, as Owner. Rather than containing the "sweeping powers" described by Bobcat, ¶ 5 of the Everflow Agreement actually limits the authority of the Operator, instead of giving the Operator expansive powers for unspecified acts. Paragraph 5 addresses the settlement of claims against Everflow and limits the ability of Bobcat to incur expenses on behalf of Everflow. The opening clause of ¶ 5 states, "It is the intent of Operator and Owner to closely monitor the expenses incurred in the operation of the well" (Everflow Agreement ¶ 5.) Moreover, ¶ 5 is limited to the settlement of claims "arising from operations," whereas the Everflow Agreement was executed because "the parties hereto desire by this Agreement to provide

for the operation of the Well and to define the respective rights and obligations of the parties with respect thereto[.]” (*Id.* at 1.) The initiation of claims against third parties for alleged breach of fiduciary duty has no relation to the expenses incurred in the operation of oil and gas wells. Because ¶ 5 actually addresses the settlement of claims against Everflow, it in no way supports Bobcat’s assertion that the provision supplies the “negative pregnant” for Bobcat to pursue claims on behalf of Everflow. Furthermore, the following provision in ¶ 5: “anything contained herein to the contrary notwithstanding, Operator shall not undertake, without the prior written consent of Owner,” of necessity, must encompass and contradict the “negative pregnant” upon which Bobcat relies for its authority.

Finally, despite Bobcat’s bald assertion that ¶ 5 of the Everflow Agreement is the only place where claims are mentioned, this is not the case. Indeed, Everflow expressly reserved the right to seek damages and other remedies on its own behalf. “Nothing contained in this Agreement shall be deemed to limit the Owner’s rights to seek damages or other remedies to which it may be entitled as against third parties furnishing services and materials.” (*Id.* ¶ 2.)

The Everflow Agreement “sets forth the entire understanding of the parties” (*id.* ¶ 20) and “define[s] the respective rights and obligations of the parties” (*id.* at 1). The Court finds that

the Everflow Agreement does not, either expressly or implicitly, provide Bobcat with standing to assert the Admin Claim absent the affirmative – perhaps even the prior written – consent of Everflow. “[T]o be absolutely clear, the Everflow Entities do not approve of the actions taken by Bobcat.” (Everflow Br. at 6.) “Nor did Bobcat request the Everflow Entities’ approval to perform such tasks.” (*Id.*)

c. Atlas Agreement

Bobcat states that the Atlas Agreement “provides Bobcat sweeping powers with respect to the management of the wells and the working interests Atlas holds in those wells.” (*Id.* at 19 (citing Atlas Agreement).) “Because [the Atlas Agreement] provide[s] Bobcat with sweeping authority and an obligation to exercise full control over operations it is appropriate for Bobcat, as operator, in the reasonable and prudent exercise of its discretion and business judgment, to bring claims and commence litigation to recover amounts improperly paid out of the revenues from the [sic] each well.” (Bobcat Atlas Reply at 5.) The Atlas Agreement, as defined *supra* at 9, includes (i) Joint Venture Agreement (“JVA”) (Doc. 442, Ex. A at 2-17); (ii) Model Form Operating Agreement (“MFOA”) (*id.* at 18-37); and (iii) Accounting Procedure Joint Operations (“APJO”) (*id.* at 38-48). The Court will reference those contracts independently when necessary for clarity.

In support of its standing to bring the Admin Claim, Bobcat quotes or cites portions of the following provisions in the Atlas Agreement:

JVA:

I. Operational Roles:

It is agreed that Atlas will be Operator of the oil and gas wells to be drilled under the terms hereof; and it is further agreed that D&L will provide its services for the drilling, production and well maintenance services for the well. Additionally, D&L will provide all accounting services, as they relate to the expenses and incomes of the wells. D&L will on a monthly basis, issue to Atlas accounting of incomes and expenses along with payment for its net revenue interest in the wells as part of this agreement without additional costs other than those provided for herein or in any addendum or exhibits hereto. . . . [(JVA, Art. I.)¹⁵]

* * *

VIII. Expenses

It is understood that D&L may withhold or bill Atlas for their proportionate share of taxes, insurance, plugging, and all other expenses reasonably incurred in the reasonable and prudent operation and development of the leasehold estates covered by this Agreement in addition to their proportionate share of monthly well tending, supervision and overhead fee of \$250 per Well. [(Id., Art. VIII.)]

MFOA:

Article V. Operator

A. Delegation and Responsibilities of Operator:

D & L Energy, Inc. shall be the Operator of the Contract Area, and shall conduct and direct and have

¹⁵ Atlas, rather than D & L, being named Operator in Art. I of the JVA appears to be a scrivener's error.

full control of all operations on the Contract Area as permitted and required by, and within the limits of this agreement. . . . [(MFOA, Art. V(A).)]

* * *

Article VII. Expenditures and Liabilities of Parties

* * *

C. Payments and Accountings

Except as herein otherwise specifically provided, Operator shall promptly pay and discharge expenses incurred in the development and operation of the Contract Area pursuant to this agreement and shall charge each of the parties herein with their respective proportionate shares upon the expense basis provided in Exhibit "C". Operator shall keep an accurate record of the joint account hereunder, showing expenses incurred and charges and credits made and received. [(MFOA, Art. VII(C).)]

* * *

Article X. Claims and Lawsuits

Operator may settle any single uninsured third party damage claim or suit arising from operations hereunder if the expenditure does not exceed TWENTY-FIVE HUNDRED Dollars (\$2,500.00) and if the payment is in complete settlement of such claim or suit. If the amount required for settlement exceeds the above amount, the parties hereto shall assume and take over the further handling of the claim or suit, unless such authority is delegated to Operator. . . . (*Id.*, Art. X.)

APJO:

II. Direct charges

Operator shall charge the Joint Account with the following items,

* * *

15. Other Expenditures

Any other expenditure not covered or dealt with in the foregoing provisions of this Section II, or in Section III and which is of direct benefit to the Joint Property and is incurred by the Operator in the necessary and proper conduct of the Joint Operations. [(APJO, § II ¶ 15.)]

(Bobcat Br. at 19 (emphasis added); Bobcat Atlas Reply at 3-4 (emphasis added).) The portions of the Atlas Agreement quoted by Bobcat are underlined for emphasis. "Joint Operations," as quoted in the APJO above, is defined as "all operations necessary or proper for the development, operation, protection and maintenance of the Joint Property." (APJO, § I ¶ 1.) "Joint Property" is defined as "the real and personal property subject to this agreement to which this Accounting Procedure is attached." (*Id.*)

Like ¶ 5 in the Everflow Agreement, Article X of the MFOA – Claims and Lawsuits – does not provide authority or standing for Bobcat to pursue claims on behalf of Atlas. Instead, Article X limits the authority of the Operator to settle claims and, thus, incur costs on behalf of Atlas. Article X is also limited to "third party damage claim[s] or suit[s] arising from operations" (MFOA, Art. X.) The Admin Claim brought against D & L, as former Operator, is not a suit arising from operations. Specifically, the operations described in the MFOA are as follows:

WHEREAS, the parties to this agreement are owners of oil and gas leases and/or oil and gas interests in the land identified in Exhibit "A", and the parties hereto have reached an agreement to explore and develop

these leases and/or oil and gas interests for the production of oil and gas to the extent and as hereinafter provided.

(*Id.* at 1 (emphasis added).) The alleged claim for breach of fiduciary duty has no relation to the exploration and development of oil and gas interests. Accordingly, Bobcat's limited authority to settle certain claims pursuant to Article X of the MFOA does not imply that Bobcat has the authority to bring the Admin Claim for breach of fiduciary duty in the first instance.

Similarly, the JVA provides that Bobcat's "Operational Roles" are to "provide its services for the drilling, production and well maintenance services for the well" and "provide all accounting services, as they relate to the expenses and incomes of the wells." (JVA, Art. I.) Neither of these functions includes the authority to bring suit against a third party for breach of fiduciary duty. Moreover, the expenses for which Atlas is responsible include "all other expenses reasonably incurred in the reasonable and prudent operation and development of the leasehold estates." Again, Bobcat's authority is limited to the operation and development of oil and gas interests.

Bobcat points to no specific provision that authorizes it to pursue the Admin Claim on behalf of Atlas and the "sweeping powers" it purports to have simply do not exist. Thus, Bobcat also does not have standing to pursue the Admin Claim on behalf of Atlas based on the Atlas Agreement.

Bobcat also cites a portion of the following provision, which was stricken from the APJO:

II. Direct charges

Operator shall charge the Joint Account with the following items,

* * *

10. Legal Expense

Expense of handling, investigating and settling litigation or claims, discharging of liens, payment of judgments and amounts paid for settlement of claims incurred in or resulting from operations under the agreement or necessary to protect or recover the Joint Property, except that no charge for services of Operator's legal staff or fees or expense of outside attorneys shall be made unless previously agreed to by the Parties. All other legal expense is considered to be covered by the overhead provisions of Section III unless otherwise agreed to by the Parties, except as provided in Section I Paragraph 3.

(APJO, § II ¶ 10; see Bobcat Atlas Reply at 4.) Bobcat argues that this provision would "require the operator to first get approval for the fees and expenses of outside counsel By eliminating that restriction on how Bobcat can proceed, the [Atlas Agreement] leaves unrestricted Bobcat's broad authority to act in the manner it reasonably determines is 'necessary and proper conduct of the Joint Operations.'" (Bobcat Atlas Reply at 4-5.) Simply put, this provision was stricken from the APJO by the parties. Bobcat cannot rely on terms that are not part of the agreement to support its authority to bring the Admin Claim.

V. CONCLUSION

For the reasons set forth herein, the Court finds that Bobcat does not have standing to pursue the Admin Claim, as set forth in the Application, either on behalf of itself or on behalf of any third parties. First, Bobcat has transferred the Acquired Assets, including the Assigned Contracts, to BW&P and BM, which are legal entities separate from Bobcat. Second, based on the express disclaimer in the APA, Bobcat does not and cannot establish that it has an injury in fact caused by the alleged breach of fiduciary duty by D & L. Third, D & L was both the fiduciary of the D & L Trust Account and the owner of the Acquired Assets, which entities comprising the Acquired Assets were the beneficiaries of the D & L Trust Account. Because a fiduciary cannot breach a duty to itself or when a beneficiary ratifies or consents, Bobcat does not possess a claim for breach of fiduciary duty against D & L.

Bobcat also lacks standing to bring the Admin Claim on behalf of third parties, which have not consented to Bobcat filing the Admin Claim on their behalf. In addition, the D & L Trust Agreement was not an Assigned Contract and, thus, Bobcat cannot pursue the Admin Claim pursuant to the D & L Trust Agreement. Moreover, to the extent there were or may be breaches of fiduciary duty by D & L in performing its obligations under the D & L Trust Agreement, those obligations did not inure to the new Bobcat Trust Agreement for which Bobcat is trustee. Finally, the JV Agreement, the

Everflow Agreement, and the Atlas Agreement do not provide Bobcat the express or implicit authority to file the Admin Claim for breach of fiduciary duty.

As a consequence, the Court finds that Bobcat does not have standing to assert the Admin Claim and will deny the Application.

#

IT IS SO ORDERED.

Dated: July 12, 2016
10:02:03 AM



Kay Woods

 Kay Woods
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

D & L ENERGY, INC., *et al.*,

Debtors.

*
*
*
*
*
*
*

CASE NUMBER 13-40813

CHAPTER 7

HONORABLE KAY WOODS

ORDER DENYING APPLICATION OF BOBCAT ENERGY RESOURCES LLC FOR
ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM (DOCS. 1518 AND 1546)

On October 6, 2015 and December 15, 2015, respectively, Bobcat Energy Resources LLC ("Bobcat") filed Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim (Doc. 1518) and Amended and Supplemented Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim (Doc. 1546) (collectively, "Application"). On October 7, 2015, Bobcat filed Exhibit 1 to the Application, which is entitled Production Revenue Trust Agreement ("D & L Trust Agreement")

(Doc. 1519). In the Application, Bobcat seeks allowance of an administrative expense claim in an amount not less than \$1,443,582.00 pursuant to 11 U.S.C. § 503(b)(1)(A) ("Admin Claim"). The issue presently before the Court is whether Bobcat has standing to bring the Application on its own behalf and/or on behalf of third parties.

The following parties filed a response, joinder, and/or objection to the Application:

- The JV Responders¹ filed Response, Joinder, and Limited Objection of D&L Joint Venture Working Interest Owners to Amended and Supplemented Application for Allowance of Administrative Expense Claim (Claim No. 253-3) Filed by Interested Party Bobcat Energy Resources, LLC (Doc. 1558) on January 18, 2016;
- Anthony J. DeGirolamo, Chapter 7 Trustee for the substantively consolidated estates of Debtors D & L Energy, Inc. and Petroflow, Inc. ("Trustee"), filed Objection of Anthony J. DeGirolamo, Chapter 7 Trustee, to the Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim (Doc. 1561) on January 21, 2016;
- Everflow Eastern, Inc. and Everflow Eastern Partners, L.P. (collectively, "Everflow") filed Precautionary Joinder and Limited Objection to Amended and Supplemented Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim and Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim (Doc. 1566) on January 26, 2016; and
- Atlas Resources, LLC, successor by merger to Atlas Resources, Inc. ("Atlas"), filed Joinder of Atlas Resources, LLC to Everflow Eastern, Inc. and Everflow Eastern Partners, L.P.

¹ All terms not defined herein are defined in the Court's Memorandum Opinion Regarding Standing of Bobcat Energy Resources LLC to Bring Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim entered on this date.

Precautionary Joinder and Limited Objection (Doc. 1569) on February 2, 2016.

Bobcat filed Bobcat Energy Resources' Reply to "Limited Objection" of the JV Responders and Enervest [sic] Entities (Doc. 1568) on January 28, 2016.

The Court held a hearing on the Application on February 3, 2016, at which appeared: (i) Andrew J. Petrie, Esq. on behalf of Bobcat; (ii) Jeremy M. Campana, Esq. on behalf of the Trustee; (iii) Robert A. Bell, Jr., Esq. on behalf of Everflow; (iv) James G. Floyd, Esq. on behalf of the JV Responders; and (v) Emily W. Ladky, Esq. on behalf of Atlas. Following the hearing, the Court entered Order Setting Briefing Schedule and Suspending Formal Discovery ("Briefing Order") (Doc. 1570), in which the Court directed the parties to file briefs regarding Bobcat's standing to bring the Application. Specifically, the Court ordered Bobcat to file a brief "setting forth (i) Bobcat's standing to bring the Application on its own behalf, (ii) the identity of each third party on whose behalf Bobcat filed the Application, and (iii) the basis for Bobcat's standing to file the application on behalf of those third parties[.]" (Briefing Order ¶ 1.)

Pursuant to the Briefing Order, on February 17, 2016, Bobcat filed Bobcat Energy Resource's [sic] Brief Setting Forth the Bases for its Standing to Bring its Amended and Supplemental Application for Allowance of Administrative Expense Claim (Doc. 1572) and

Declaration of Robert Rivkin (Doc. 1573). On February 24, 2016, the following response briefs were filed:

- The JV Responders filed D&L Joint Venture Working Interest Owners' Brief on Standing of Interested Party Bobcat Energy Resources, LLC (Doc. 1576);
- Everflow filed Everflow Entities Response Brief to Bobcat Energy Resource's Brief Setting Forth the Bases for its Standing to Bring its Amended and Supplemental Application for Allowance of Administrative Expense Claim (Doc. 1579);
- The Trustee filed Response Brief of Anthony J. DeGirolamo, Chapter 7 Trustee, with Respect to Standing of Bobcat Energy Resources LLC to Assert Administrative Expense Claim on Behalf of Itself and Third Parties (Doc. 1580); and
- Atlas filed Response Brief of Atlas Resources, LLC, in Opposition to Bobcat Energy Resource's Brief Setting Forth the Bases for it's [sic] Standing to Bring its Amended and Supplemental Application for Allowance of Administrative Expense Claim (Doc. 1581).

On March 2, 2016, Bobcat filed the following:

- Reply to the Response Brief of Atlas Resources, LLC in Opposition to Bobcat Energy Resources's Brief Setting Forth the Bases for its Standing to Bring its Amended and Supplement Application for Allowance of Administrative Expense (Doc. 1584).
- Bobcat Energy Resource's [sic] Reply in Support of its Brief Setting Forth the Bases for its Standing to Bring its Amended and Supplemental Application for Allowance of Administrative Expense Claim (Doc. 1585); and

In order to better understand the basis for Bobcat's assertion that it is a creditor asserting its own rights, on March 28, 2016, the Court entered Order Requiring Bobcat Energy Resources LLC to File a Supplement Identifying its Own Interest in the Entities Bobcat Purports to Represent for Purposes of the Administrative

Expense Claim (Doc. 1597). In response, Bobcat filed Bobcat Energy Resource's [sic] Court-Ordered Supplement (Doc. 1635) on April 22, 2016. On July 1, 2016, Bobcat filed Bobcat Energy Resource's [sic] Supplement to its Previous Court-Ordered Supplement (Doc. 1649).

For the reasons set forth in the Court's Memorandum Opinion Regarding Standing of Bobcat Energy Resources LLC to Bring Application of Bobcat Energy Resources LLC for Allowance of Administrative Expense Claim entered on this date, the Court hereby:

1. Finds that Bobcat has transferred the Acquired Assets, including the Assigned Contracts, to Bobcat Well & Pipeline, LLC and Bobcat Minerals, LLC, which are legal entities separate from Bobcat;
2. Finds that, as a result of and subsequent to the transfer of the Acquired Assets, including the Assigned Contracts, Bobcat cannot enforce any rights relating to the Acquired Assets or rights pursuant to the Assigned Contracts;
3. Finds that, based on the express disclaimer in the APA, Bobcat does not and cannot establish that it has an injury in fact caused by the alleged breach of fiduciary duty by D & L;
4. Finds that, at all times relevant to the Application,
 - (i) D & L was the fiduciary of the D & L Trust Account;
 - (ii) D & L was the sole owner of the Acquired Assets; and

- (iii) all of the entities comprising the Acquired Assets were the beneficiaries of the D & L Trust Account;
5. Finds that, because a fiduciary cannot breach a duty to itself, Bobcat does not possess a claim for breach of fiduciary duty against D & L;
 6. Finds that Bobcat does not have standing to pursue the Admin Claim on its own behalf;
 7. Finds that no third parties have consented to or subsequently ratified Bobcat filing the Admin Claim on their behalf;
 8. Finds that O.R.C. § 5808.11 does not confer standing on Bobcat to pursue the Admin Claim on its own behalf or on behalf of any third party;
 9. Finds that the D & L Trust Agreement was not an Assigned Contract and, thus, Bobcat cannot pursue the Admin Claim based on the D & L Trust Agreement;
 10. Finds that, individually and/or collectively, the JV Agreement, the Everflow Agreement, and the Atlas Agreement do not provide Bobcat the express or implicit authority to file the Admin Claim on behalf of (i) joint ventures, LLCs, and PPMs; (ii) Everflow; or (iii) Atlas; and
 11. Finds that Bobcat does not have standing to pursuant the Admin Claim on behalf of any third party.

Accordingly, the Court hereby:

- A. Denies the Application; and
- B. Disallows Claim No 253-3 in its entirety.

#