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**MEMORANDUM OPINION REGARDING DEBTORS'**  
**MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**  
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Before the Court is Motion for Partial Judgment on the Pleadings of Plaintiff's Complaint ("Debtors' Motion") (Doc. 20) filed by Debtors/Defendants/Counter-Claimants D & L Energy, Inc. and Petroflow, Inc. ("Debtors") on July 9, 2014. On July 28, 2014, Plaintiff/Counter-Defendant Resource Land Holdings, LLC ("RLH") filed Opposition and Response to Sellers' Motion for Partial Judgment on the Pleadings of Plaintiff's Complaint ("RLH's Response") (Doc. 35). The Debtors filed Reply to Resource Land Holding LLC's Response to Motion for Partial Judgment on the Pleadings of Plaintiff's Complaint ("Debtors' Reply") (Doc. 40) on August 4, 2014.

By way of background, on May 30, 2014, RLH filed Complaint for Declaratory Judgment (Doc. 1), which commenced this adversary proceeding. The Complaint consists of 47 pages, 143 numbered paragraphs and 2 claims for relief. On June 16, 2014, the Debtors filed Answer to Complaint (Doc. 7) and Counterclaim Against Plaintiff Resource Land Holdings, LLC (Doc. 9). On July 7, 2014, RLH filed Amended Reply to Counterclaim (Doc. 19).

The Debtors' Motion purports to seek "judgment on the pleadings on (1) the First Claim for Relief set forth in RLH's Complaint; and (2) sub-parts (c), (d) and (e) of the requested

declarations found at Paragraph 136 [sic] of RLH's complaint related to its Second Claim for Relief."<sup>1</sup> (Debtors' Mot. at 1.) In reality, however, the Debtors address only whether RLH has stated a claim for material breach that entitled RLH to terminate the APA.<sup>2</sup> The Debtors may believe it is self-evident that, if they are entitled to judgment on the pleadings regarding the fourth request for declaratory judgment - *i.e.*, RLH did not properly terminate the APA - then the Debtors would also be entitled to judgment on the fifth request for declaratory judgment - *i.e.*, RLH is not entitled to return of the Deposit Amount<sup>3</sup> and the North Lima DW 4 Deposit. The Debtors, however, fail to actually make this argument. With respect to the third request for declaratory judgment, the Debtors only request judgment regarding part (i) of that subsection. To the extent any aspect of the relief requested by the Debtors in the Debtors' Motion is not addressed herein, judgment on the pleadings will be denied. For the reasons set forth herein, the Court will grant, in part, and deny, in part, the Debtors' Motion.

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<sup>1</sup> Despite the Debtors' contention that RLH's requests for declaratory judgment are contained in paragraph 136 of the Complaint, paragraph 136 sets forth the alleged controversies between the parties. Instead, the five corresponding requests for declaratory judgment are set forth in paragraph 142 of the Complaint. For the sake of clarity, the Court will refer to subparts (c), (d) and (e) of paragraph 142 as RLH's third, fourth and fifth requests for declaratory judgment.

<sup>2</sup> APA is defined *infra* at 5.

<sup>3</sup> All capitalized terms not defined herein are defined in the APA.

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). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

## **I. BACKGROUND**

### **A. Main Case**

The Debtors filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code on April 16, 2013.<sup>4</sup> On September 18, 2013, the Debtors filed (i) a motion seeking approval of bid procedures for an auction sale of substantially all of their assets (Main Case, Doc. 203); and (ii) a motion seeking authority to sell substantially all of their assets to the highest and best bidder (Main Case, Doc. 204). A proposed asset purchase agreement was attached to the bid procedures motion as Exhibit A. Following the October 15, 2013 hearing on the bid procedures motion, the Court approved the bid procedures motion ("Bid Procedures Order") (Main Case, Doc. 270). On November 19, 2013, the Debtors filed a proposed order granting the sale motion (Main Case, Doc. 451). Attached to the proposed order granting the sale motion were:

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<sup>4</sup> The Debtors' bankruptcy cases are being jointly administered as Case No. 13-40813 ("Main Case").

(i) Exhibit A – a clean copy of the proposed asset purchase agreement between the Debtors and RLH; and (ii) Exhibit B – a redline copy of the proposed asset purchase agreement.

At the November 19, 2013 hearing on the sale motion, the Court granted the sale motion subject to its review of a final asset purchase agreement and, in doing so, approved the sale of substantially all of the Debtors' assets to RLH. On December 9, 2013, the Court signed an order approving the sale motion ("Sale Order") (Main Case, Doc. 568).<sup>5</sup> Exhibit A to the Sale Order is the Asset Purchase Agreement executed by the Debtors and RLH ("APA").<sup>6</sup> Subject to adjustments, the APA Purchase Price is \$20.7 million. (APA § 2.1.)

#### **B. RLH's Complaint**

In the Complaint, RLH asserts that it permissibly terminated the APA following the Debtors' material breaches thereof. In its first claim for relief, RLH seeks monetary damages resulting from the Debtors' alleged breaches of the APA in "an amount that is not less than \$1.050,000 [sic]." (Compl. ¶ 133.) In its second claim for relief, RLH requests the Court to enter the following five declaratory judgments:

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<sup>5</sup> The Sale Order was "submitted" by counsel for the Debtors. Although the Sale Order does not indicate that it was "approved" by RLH, the Court, in a telephonic conference call involving counsel for both the Debtors and RLH, discussed the content of the Sale Order prior to its entry.

<sup>6</sup> The APA is also attached to RLH's Complaint as Exhibit A.

(a) RLH timely and properly identified and notified [the Debtors] of the existence and specific nature of Defects as Section 3.1.6 of the APA defines that term;

(b) RLH timely and properly identified and notified [the Debtors] of the existence of their breaches of their representations and warranties made in the APA, as well as their breaches of certain other provisions of the APA;

(c) The APA provides RLH with two principal, but not mutually exclusive, remedies that, in turn, afford RLH three paths down which it can proceed: (i) for the limited category of Acquired Assets specifically listed on Schedule 3.1.6, RLH can acquire the asset subject to a price reduction as set forth in the formulae contained in that Schedule; (ii) for those of the Acquired Assets specifically listed on Schedule 3.1.6, and for matters not specifically identified as a Defect, RLH has the remedies for [the Debtors'] breaches of representations and warranties, or material breaches of other provisions of the APA, up to and including termination; and (iii) for those of the Acquired Assets not specifically listed on Schedule 3.1.6, RLH has the remedies for breaches of representations and warranties, or material breaches of other provisions of the APA, up to and including termination;

(d) RLH properly terminated the APA; and

(e) RLH is entitled to the return of the Deposit Amount and the North Lima DW 4 Deposit in the combined amount of \$2,470,000, both without setoff or deduction of any kind.<sup>7</sup>

(*Id.* ¶ 142.)

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<sup>7</sup> Of the \$2.47 million RLH deposited with the Deposit Agent, (i) \$2.07 million is the Deposit Amount; and (ii) \$400,000 is a good faith earnest money deposit toward the purchase of the Debtors' interest in North Lima Disposal Well # 4, LLC ("North Lima DW 4") pursuant to an asset purchase agreement that was to be separately negotiated. (APA at 1-2.)

Generally speaking, RLH alleges that it was entitled to terminate the APA pursuant to Section 4.4 of the APA<sup>8</sup> because the Debtors failed to cure the following material breaches within five days after receiving notice thereof:

1. The 987 acres of active leases in Noble County, Ohio that are listed as Acquired Assets in Exhibit 1 to Schedule 1.1(a) of the APA ("Noble County Leases") never went into effect and, thus, the Debtors have no interest in – and cannot convey – that acreage (*id.* ¶¶ 52-66);

2. The Debtors did not cooperate with RLH in order to allow RLH to conduct due diligence (*id.* ¶¶ 70-75), including, prior to the close of the Due Diligence Period, the Debtors failed to disclose (i) exploration agreements between D & L Energy, Inc. and Petro Evaluation Services, Inc., which granted Petro Evaluation a right of first refusal to own 51 percent of certain of the Acquired Assets (*id.* ¶¶ 76-83); and (ii) a number of contracts between the Debtors and Gasearch, which were established by insiders of D & L Energy, Inc. to overcharge investors for the personal benefit of the insiders (*id.* ¶¶ 84-86); and

3. The Debtors (i) failed to disclose litigation between the Debtors and the Ohio Department of Natural Resources ("ODNR"), which impacts whether the Debtors' salt water disposal wells will

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<sup>8</sup> Unless stated otherwise, all references to "Section" refer to the APA.

ever be permitted by the ODNR; and (ii) mischaracterized the moratorium placed on salt water disposal wells by the ODNR (*id.* ¶¶ 99-105).

RLH further contends that the Debtors anticipatorily repudiated the APA when the Debtors took the position that Section 3.1.6 does not require them to provide both a Price Reduction for and convey an Acquired Asset to RLH when the Acquired Asset has been identified by RLH as a Defect. (*Id.* ¶¶ 92-98.)

## **II. STANDARD OF REVIEW**

Federal Rule of Civil Procedure 12(c), which is incorporated by Federal Rule of Bankruptcy Procedure 7012(b), states, "After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c) (West 2014). A motion for judgment on the pleadings is reviewed under the same standard used to review a Rule 12(b)(6) motion to dismiss. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (citing *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001)). A court should grant judgment on the pleadings "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007) (quoting *Paskvan v. Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991)).

“For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment.” *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (quoting *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 549 (6th Cir. 2008)). However, a court “need not accept as true a legal conclusion couched as a factual allegation.” *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (citations and quotation marks omitted).

### **III. ARGUMENTS OF THE PARTIES & ANALYSIS**

#### **A. Material Breaches of the APA**

In the Debtors’ Motion, the Debtors state, “Central to RLH’s Complaint, and primary to the Court’s consideration, is a singular question: Is RLH permitted to terminate the APA for cause under Section 4.4 of the APA?” (Debtors’ Mot. at 3.) The Debtors argue that, even when accepting all of the facts alleged in the Complaint as true for purposes of the Debtors’ Motion, RLH fails to set forth any set of facts that gives rise to a material breach of the APA by the Debtors that would permit termination for cause.

“The determination of whether a party’s breach of a contract was a ‘material breach’ is generally a question of fact.” *O’Brien v. Ohio State Univ.*, 2007 Ohio 4833, ¶ 11 (Ohio Ct. App. 2007) (citation omitted). The basis for this principle is that “to

determine whether a party's breach was material requires, inter alia, an examination of the parties' injuries, whether and how much the injured parties would or could have been compensated, and whether the parties acted in good faith. All of these inquiries turn on subjective facts." *Id.* However, if the pleadings are so deficient that they fail to set forth facts that state a plausible claim for breach of contract, a court may enter judgment on the pleadings regarding the lack of material breach.

Termination of the APA is governed by Section 4.4, which states in its entirety<sup>9</sup>:

4.4 Termination. Notwithstanding anything to the contrary in this Agreement, this Agreement may be terminated and the transactions contemplated hereby abandoned: (a) at any time prior to the Closing, by mutual written agreement of Sellers and Buyer; (b) by either Sellers or Buyer if a material breach of any provision of this Agreement has been committed by the other party and such breach has not been waived or cured within five (5) business days of the non-breaching party's receipt of notice of such breach by the other party, provided that such a breach is able to be cured; (c) by Sellers if any of the conditions set forth in Section 4.1 (excluding Section 4.1.4) shall not have been satisfied by Buyer or waived by Seller as of the Closing Date; or (d) by Buyer if any of the conditions set forth in Sections 4.2 shall not have been satisfied by Sellers or waived by Buyer as of the Closing Date; unless the time for performance of clause (b), (c) or (d) has been extended by mutual written agreement of the parties; provided, however, that the party seeking termination pursuant to clause (b), (c), or (d) above is not in breach in any material respects of any of its representations, warranties, covenants or agreements contained in this Agreement. Except as may be limited elsewhere in this Agreement, termination of this

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<sup>9</sup> The APA defines RLH as "Buyer" and the Debtors as "Sellers." (APA at 1.)

Agreement shall not in any way terminate, limit or restrict the rights and remedies of any party hereto against any other party that has breached this Agreement prior to the termination hereof.

(APA § 4.4 (emphasis added).)

The APA does not define "material breach." Thus, the Court must look to Ohio case law.<sup>10</sup> "A breach is material if performance or nonperformance of the disputed term is essential to the purpose of the agreement." *Bd. Of Comm'rs v. Batavia*, 2001 Ohio 4210, \*3 (Ohio Ct. App. 2001) (citing *Software Clearing House, Inc. v. Intrak, Inc.*, 583 N.E.2d 1056, 1060 (Ohio Ct. App. 1990)). Courts interpreting Ohio law consider the following five factors to determine if a breach is material:

[T]he extent to which the injured party will be deprived of the expected benefit, the extent to which the injured party can be adequately compensated for the lost benefit, the extent to which the breaching party will suffer a forfeiture, the likelihood that the breaching party will cure its breach under the circumstances, and the extent to which the breaching party has acted with good faith and dealt fairly with the injured party.

*Batavia*, 2001 Ohio 4210 at \*3 (quoting *Software Clearing House*, 583 N.E.2d at 1060).

The Court will address each of the three breaches alleged by RLH to determine whether the Debtors are entitled to judgment as a matter of law because those breaches are not material. The Court

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<sup>10</sup> The parties do not dispute that interpretation of the APA is governed by Ohio law. (APA § 12.15 ("This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio . . . .").)

will then address RLH's arguments that (i) the alleged breaches, taken as a whole, constitute a material breach of the APA; and (ii) the Debtors anticipatorily repudiated the APA.

### **1. Noble County Leases**

RLH states that the Noble County Leases, listed as 987 acres on Exhibit 1 to Schedule 1.1(a), "equaled approximately fourteen and one-half percent (14.45% rounded) of what [the Debtors] represented they were selling as active acreage. Accordingly, this was a material part of the Acquired Assets." (Compl. ¶ 55.) RLH further states that the Noble County Leases were "not in the three narrow categories of assets that Section 3.1.6 addressed, and the parties had not agreed to any re-pricing mechanism for assets not included in Section 3.1.6[.]" (*Id.* ¶ 65(b).)

The Debtors argue that failure to transfer the Noble County Leases cannot constitute a material breach because either (i) exclusion of the Noble County Leases is accounted for in the price reduction formula in Schedule 3.1.6; or (ii) RLH did not allocate any portion of the \$20.7 million Purchase Price to the Noble County Leases. If, as RLH contends, the parties did not agree to a price reduction mechanism for the Noble County Leases, RLH "necessarily placed 100% of the value of the assets to be transferred under the APA to assets other than the Noble County Acreage and placed no value on the Noble County Acreage itself." (Debtors' Mot. at 11 (emphasis removed).) The Debtors assert:

Excluding the Noble County Acreage from transfer at Closing does not defeat the essential purpose of the APA – RLH will still receive transfer (or a price reduction for the non-transfer) for all of the assets to which RLH attributed any value under the APA through the comprehensive price reduction mechanism of Section 3.1.6 and Schedule 3.1.6 of the APA. Further, the alleged breach does not render performance of the APA impossible – Debtor is ready, willing and able to transfer the vast majority of the assets under the APA.

(*Id.*)

The Debtors further argue that, pursuant to Section 5.3, they were only required to transfer at Closing all of their rights, title and interest in the Acquired Assets; therefore, the Debtors did not warrant that they held title to any assets, including the Noble County Leases. Finally, Section 7.1 expressly states that the Debtors made no representations regarding title to any of the Acquired Assets: “[E]xcept 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, . . . the transferability of Acquired Assets) . . . [and] the title of the Acquired Assets . . . .” (*Id.* at 12 (quoting APA § 7.1).)

In response, RLH contends that the Debtors warranted in Section 5.3 that they had the right to convey the Acquired Assets “free and clear of any lease, lien, security interest, claim, charge, or encumbrance whatsoever . . . .” (*Id.* at 4-5 (quoting APA § 5.3).) RLH argues that the “free and clear” language

supports its position that the Debtors warranted that they possessed unencumbered title to the Acquired Assets. Furthermore, the implied warranty disclaimer in Section 7.1 is limited by the phrase "except as specifically stated herein." (APA § 7.1.) Thus, the Debtors' general warranty disclaimer in Section 7.1 is subject to the Debtors' express warranty in Section 5.3 to transfer the Acquired Assets unencumbered.

The first question for the Court to address is whether the Debtors' inability to convey the Noble County Leases constitutes a breach of Section 5.3. RLH argues that the Debtors' inability to convey the Noble County Leases constitutes a material breach of the APA because the Debtors (i) included among the Acquired Assets the Noble County Leases, which constituted approximately 14.5 percent of the active acreage (Compl. ¶ 53); and (ii) warranted in Section 5.3 that they had the power and right to convey title to the Acquired Assets (*id.* ¶ 57).

In Section 7.1, RLH acknowledges the Debtors' express disclaimer of all representations and warranties regarding the Acquired Assets, "except as specially stated herein." Section 7.1 provides:

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, . . . the transferability of Acquired Assets), . . . the title of the Acquired Assets (or any portion thereof) . . . or

any other matter or thing relating to the Acquired Assets (or any portion thereof) . . . . Buyer further acknowledges and agrees that during the Due Diligence Period it will attempt to conduct 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 deems necessary or appropriate, and that, in proceeding with its acquisition of the Acquired Assets, Buyer is entering into this transaction solely upon the representations warranties and covenants of Sellers as expressly set forth herein and Buyer's independent inspections and investigations. . . .

(APA § 7.1 (emphasis added).) RLH contends that the "except[ion] as specifically stated herein" is found in Section 5.3, wherein the Debtors represented and warranted that they had title to and the right to convey the Acquired Assets, including the Noble County Leases. (Compl. ¶ 57.)

Section 5.3 states, in its entirety:

5.3 Title to the Acquired Assets. Except as set forth on Schedule 5.3, Sellers have and on the Closing Date will have complete and unrestricted power and the unqualified right to sell, assign, transfer, convey and deliver to Buyer, and will transfer and convey to Buyer at the Closing, and Buyer will acquire at the Closing, all of the Sellers' rights, title and interests in and to the Acquired Assets free and clear of any lease, lien, security interest, claim, charge, or encumbrance whatsoever, except as set forth on Schedule 1.4.<sup>11</sup>

(APA § 5.3 (emphasis added).) RLH argues that this section is not limited to assets that the Debtors actually own. RLH points to paragraph 11 of the Sale Order, which authorized the Debtors to "sell all of their rights, title and interests in and to the

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<sup>11</sup> Schedules 5.3 and 1.4 are blank and contain no exceptions.

Acquired Assets to the Buyer in accordance with the terms and subject to the conditions of the APA[.]” (Sale Order ¶ 11.) RLH notes that this paragraph lacks any language that limits the Debtors’ rights, title and interest, such as the phrase “if and to the extent of” such interest. (RLH’s Resp. at 6) Thus, RLH argues that the Debtors made an unconditional representation that they had the right to convey title to all of the Acquired Assets.

RLH’s reading of Section 5.3 and the Sale Order is flawed. RLH selectively quotes from the Sale Order. The sentence preceding the language quoted by RLH states, “The Debtors’ interests in the Acquired Assets constitute property of the Debtors’ estates pursuant to section 541(a) of the Bankruptcy Code.”<sup>12</sup> (Sale Order ¶ 11.) Section 541(a) provides that the bankruptcy estate is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1) (West 2014). As a consequence, the Court authorized the Debtors to sell the Acquired Assets to the extent they had any

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<sup>12</sup> The entirety of paragraph 11 of the Sale Order states:

The Debtors’ interests in the Acquired Assets constitute property of the Debtors’ estates pursuant to section 541(a) of the Bankruptcy Code. Debtors are hereby authorized to sell all of their rights, title and interests in and to the Acquired Assets to the Buyer in accordance with the terms and subject to the conditions of the APA, and per further order of this Court on pending and/or future motions to assume and/or assign executory contracts and/or unexpired leases.

(Sale Order ¶ 11.)

legal or equitable interest in them. There was no need for the excess language that RLH states is lacking from the Sale Order because the Acquired Assets were identified as property of the Debtors' bankruptcy estate pursuant to statutory definition.

Likewise, Section 5.3 does not stand in isolation; the disclaimer in Section 7.1 does not point to Section 5.3 as the exception, but provides "except as specifically stated herein." (APA § 7.1 (emphasis added).) Thus, the Court must look to the entire APA. The language regarding the Debtors' "right to sell . . . free and clear" in Section 5.3 is replicated in the third WHEREAS clause of the APA,<sup>13</sup> which contains nearly identical language. (*Id.* § 5.3.)

WHEREAS, on the terms and subject to the conditions set forth in this Agreement, Buyer desires to purchase from Sellers, and Sellers desire to assign and sell to Buyer, any, all and every asset owned by Sellers, except as specifically excluded in Section 1.2 of this Agreement, used in the operation of the Business free and clear of all liens, claims and encumbrances to the maximum extent permitted by section 363 of the Bankruptcy Code, and to take assignment from Sellers of certain contracts pursuant to section 365 of the Bankruptcy Code[.]

(*Id.* at 1 (emphasis added).) The Court finds that the "free and clear" language in Section 5.3 is not unconditional, but implicitly incorporates the reference to § 363 of the Bankruptcy Code in the third WHEREAS clause, which expressed the intention of the parties. As a consequence, the Debtors did not warrant that they had an

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<sup>13</sup> The WHEREAS clauses are incorporated by reference into the APA. (APA at 2.)

unconditional right to convey title to all of the Acquired Assets; they merely warranted that they had the right to convey title to the Acquired Assets to the maximum extent permitted by § 363 of the Bankruptcy Code. Without an unconditional warranty of the right to convey, the Debtors' inability to convey the Noble County Leases does not constitute a breach of Section 5.3.

This does not end the inquiry, however. RLH alleges that the Debtors' failure to convey the Noble County Leases constitutes a material breach because, although the Debtors included such leases within the Acquired Assets, the Debtors never had the right to convey the Noble County Leases:

RLH pointed out on February 19[, 2014] that there is a material difference between a lack of marketable title or other deficiency in certain leasehold acreage so as to give rise to a Defect (as Sellers argued was an analogous situation) vs. a total absence of title at the time of contracting as to an entire class of assets (as RLH pointed out was the case here).

(Compl. ¶ 66.) Thus, RLH contends that because the Debtors did not have any rights in the Noble County Leases at the time they signed the APA, inclusion of the Noble County Leases in the Acquired Assets was a material breach of contract.

The Noble County Leases are only a portion of the active leases included in the Acquired Assets. RLH asserts that, at approximately 14.5 percent of the active leases, this portion was so significant that the Debtors' inability to convey the Noble County Leases constitutes a material breach. This assertion,

however, is not a statement of fact; it is a conclusion of law, which the Court does not have to accept as true.

The Acquired Assets included active leases, held by production leases, two salt water disposal wells and other assets of the Debtors. Thus, whether the Debtors' inability to convey a portion of the active leases constitutes a material breach of the APA cannot be resolved without fact-finding. Indeed, this is borne out by the vastly different arguments that the Debtors and RLH make concerning the intent of the parties regarding the purchase price reduction mechanism in Schedule 3.1.6 and whether it applies to the active leases. The Debtors argue that the Noble County Leases can be addressed through the price reduction mechanism, whereas RLH argues that there is no price reduction for the Noble County Leases. Schedule 3.1.6 does not define what is to be included within the "9,577 net acres." Reference to Exhibit 1 to Schedule 1.1(a) is not instructive because that exhibit also does not have a column for or explain what constitutes "net acres." Thus, the Court cannot ascertain from the pleadings whether the active leases were included within the price reduction mechanism in Schedule 3.1.6.

In order to find that the Debtors' inability to transfer the Noble County Leases constitutes a material breach, the Court must determine that such transfer was so fundamental to the APA that

the Debtors' inability to convey that portion of the Acquired Assets defeats the essential purpose of the APA.

Generally, a material breach of contract will entitle a party to stop performance. A "material breach of contract" is a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform.

*Marion Family YMCA v. Hensel*, 897 N.E.2d 184, 186 (Ohio Ct. App. 2008) (citations omitted).

Based on the facts in the Complaint, it is not possible for the Court to determine if the Debtors' inability to convey the Noble County Leases constitutes a material breach of the APA. "The determination of whether a party's breach of a contract was a 'material breach' is generally a question of fact." *O'Brien v. Ohio State Univ.*, 2007 Ohio 4833, ¶ 11 (Ohio Ct. App. 2007) (citation omitted); see also *Hodak v. Madison Capital Mgmt., LLC*, Nos. 08-6142, 08-6543, 348 Fed. Appx. 83, 90 (6th Cir. Sept. 10, 2009) (citation omitted) ("The determination whether a material breach has occurred is generally a question of fact answered by weighing the consequences of the breach in light of the customs of performance attendant to similar contracts."). There are simply not enough facts in the Complaint to determine if conveyance of the Noble County Leases was so essential to the APA that the Debtors' inability to convey such leases excuses performance by RLH.

Thus, although the Debtors' inability to convey the Noble County Leases does not and cannot constitute a breach of warranty in Section 5.3, whether such inability constitutes a material breach of the APA is a question of fact that cannot be determined in a motion for judgment on the pleadings.

## **2. Cooperation During Due Diligence**

The APA defines the Effective Date as the fifteenth day after entry of the Sale Order. Section 3.1.1 provides that RLH had 60 days from the Effective Date – *i.e.*, through late February 2014 – “to conduct such due diligence as Buyer may determine is necessary and appropriate, in Buyer’s sole discretion, and to evaluate and review Sellers’ Business, and Books and Records.” (APA § 3.1.1.) Section 3.1.4 states:

3.1.4 Cooperation During Due Diligence Period. Sellers, at Sellers’ cost and expense, will cooperate with Buyer and Buyer’s representatives and agents during the Due Diligence Period. Sellers will cause Sellers’ Affiliates to cooperate with Buyer and Buyer’s agents and representatives during this same period. Sellers will make available to Buyer any of Sellers’ officers and employees, and Seller’s accountants at no expense to Sellers, and will permit the examination, and duplication of Sellers’ Books and Records to the satisfaction of Buyer, provided that any duplication of Sellers’ Books and Records shall be at Buyer’s expense.

(*Id.* § 3.1.4.) RLH’s obligation to close the sale is conditioned upon “Sellers and Sellers’ Affiliates [cooperating] with Buyer in order to enable Buyer to perform Buyer’s due diligence as specified in Section 3.1.” (*Id.* § 4.2.5.) The APA does not require either

party to extend the Due Diligence period, and the APA can only be modified, amended or supplemented by a written instrument duly executed by the parties. (*Id.* § 12.4.)

RLH's allegations concerning "[the Debtors'] Breaches of Their Agreement to Cooperate with RLH" are set forth in Section G of the Complaint, beginning at paragraph 70. RLH notified the Debtors "of their material defaults under the APA arising out of the fact that [the Debtors] had not cooperated with RLH in conducting due diligence." (Compl. ¶ 74.) Specifically, RLH alleges that the Debtors failed to provide (i) copies of all the contracts governing the Debtors' operations, notwithstanding RLH's repeated requests and itemizations of the missing documents; (ii) numerous documents as being too time consuming or otherwise difficult to assemble; and (iii) access to the Debtors' books and records for reviewing and copying to RLH's satisfaction. "Compounding these problems and exacerbating this default, [the Debtors] delayed providing critical documents until after the Due Diligence Period had expired." (*Id.* ¶ 75.)

Within Section G, RLH asserts three Subsections regarding breach of contract based on the Debtors' failure to cooperate: "1. [The Debtors'] material breaches in not providing documents to RLH during the Due Diligence Period and in response to RLH's specific requests" (*id.* ¶¶ 73-75); "2. [The Debtors'] material breaches in not disclosing Petro Evaluation contracts" (*id.*

¶¶ 76-83); and "3. [The Debtors'] material breaches in not disclosing Gasearch contracts" (*id.* ¶¶ 84-86). The Court will review each of these Subsections, in turn.

The Debtors assert that RLH's Complaint "does not support a claim of non-cooperation and, in fact, reveal[s] that RLH has suffered no damage as a result of the alleged lack of cooperation" (Debtors' Mot. at 13) because RLH fails to allege that it "was denied access to Debtor's books and records or its officers, employees or accountants" (*id.*) or "impeded from gaining on-site review of Debtor's books and records" (*id.* at 14).

An examination of Section G of the Complaint demonstrates that it lacks all of the elements to state a cause of action for breach of contract. Specifically, there are no facts to support the element of damages. It is axiomatic that the following elements are necessary to state a cause of action for breach of contract:

In order to prove a breach of contract, a plaintiff must establish the existence and terms of a contract, the plaintiff's performance of the contract, the defendant's breach of the contract, and damage or loss to the plaintiff.

*Samadder v. DMF of Ohio, Inc.*, 798 N.E.2d 1141, ¶ 27 (Ohio Ct. App. 2003) (citation omitted); see also *Anadarko E&P Co. v. Northwood Energy Corp.*, 970 F. Supp. 2d 764, 769 (S.D. Ohio 2013) (quoting *Savedoff v. Access Group, Inc.*, 524 F.3d 754, 762 (6th Cir. 2008)) ("To establish a breach of contract claim in Ohio, a

plaintiff must prove, by a preponderance of the evidence, 'the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff.'"); *Holmes v. Wilson*, No. 2:08-cv-602, 2010 WL 1433169, at \*3 (S.D. Ohio Apr. 2, 2010) (citations omitted) ("Under Ohio law, a plaintiff must satisfy four elements to make out a breach of contract claim: 1) the existence of a binding contract; 2) the non-breaching party performed its contractual obligation; 3) a breach in contractual obligations by the other party; and 4) the non-breaching party suffered damages as a result of the breach.").

For purposes of determining the Debtors' Motion, the Court finds that the Complaint contains sufficient facts to establish the first three elements of a cause of action for breach of contract: (i) the existence of a binding contract – the APA; (ii) performance by RLH regarding due diligence; and (iii) the Debtors' failure to cooperate as required by the APA during the Due Diligence Period. What the Complaint lacks, however, are any facts that establish that RLH has suffered damages as a result of such breach.

With respect to the first Subsection of Section G, RLH states that "[the Debtors'] actions and omissions have greatly increased RLH's expenses, have prolonged and delayed its due diligence efforts, and have led to a large number of Defects in what was to have been the Acquired Assets . . . ." (Compl. ¶ 74 (quoting

Feb. 24, 2014 Notice of Default).) There are no other allegations of damages, and the Complaint lacks any facts to support any increased expenses of due diligence as a result of the Debtors' failure to cooperate. Although RLH asserts generally that it has suffered increased expenses and that its due diligence has been delayed, these are conclusory allegations. RLH offers no facts concerning what increased expenses it incurred or how these expenses related to the Debtors' lack of cooperation. RLH also does not state how its due diligence was delayed or how any delay caused RLH damages. RLH has offered no estimation of how much due diligence should have cost and how long due diligence should have taken had the Debtors fully cooperated.

RLH attempts to supplement its conclusory allegations regarding due diligence damages by arguing in its Response:

[The Debtors'] contentions that RLH has alleged only two limited specifics and that it has not alleged that it suffered damages from this breach are wrong. RLH alleges: (a) the specifics of RLH's notices, which, in turn, detail the specifics of [the Debtors'] failures to cooperate [Cmplt. [Dkt. No. 1] ¶¶ 73 (identifying 11 specific letter requests), 74 (RLH's notice of default)]; and (b) the due diligence expenses it incurred tracking down and sorting out what [the Debtors] were not providing [id. ¶¶ 2-3 (making RLH's due diligence more expensive and time-consuming, impairing the value of the assets), 74 (notice letter listing damages), 87 (leading to Defects in all of the assets Schedule 3.1.6 lists)].

(RLH's Resp. at 15 (n.6-7 omitted) (citations to Debtors' Mot. removed).) The references in (a), above, all relate to RLH's

allegations of the Debtors' breach of the duty to cooperate, but do not provide any facts to support damages. In (b), above, RLH attempts to state damages, but these citations to the Complaint provide no facts beyond the conclusory allegation that the Debtors' failure to cooperate increased RLH's due diligence expenses.

Although RLH states that it incurred additional expenses "tracking down and sorting out what [the Debtors] were not providing" (*id.* at 15 (citations and parentheticals omitted)), RLH does not set forth any facts concerning these additional expenses or the efforts it undertook. At most, RLH refers to the "hundreds of thousands of dollars [it spent] conducting a due diligence investigation on an accelerated schedule and in accord with this Court's Sale Order[.]" (Compl. ¶ 2.) RLH knew, before it engaged in the bid process, that it was seeking to purchase assets from a bankruptcy estate and that there would be a relatively short or "accelerated" due diligence period. Furthermore, RLH admits that due diligence was conducted in accordance with the Sale Order. RLH also knew or should have known that conducting due diligence would or could be expensive. Paragraph 2 of the Complaint simply provides no facts to support a claim of damages as a result of the Debtors' failure to cooperate with due diligence. The fact that RLH had to provide notices of Defect for all or nearly all of the Acquired Assets also does not state a claim of damages. The APA expressly provides RLH with the right to provide a notice of Defect

and obtain a Purchase Price Reduction. (APA § 3.1.6, Sched. 3.1.6.) Under RLH's interpretation of the APA, RLH can obtain the entirety of an asset identified as a Defect with the price reduction. As a consequence, RLH has failed to state any facts in support of a damages claim stemming from RLH being forced to provide notices of Defect regarding the Acquired Assets.

In the second and third Subsections of Section G, RLH alleges that the Debtors' failure to disclose the Petro Evaluation and the Gasearch contracts constituted a material breach. RLH states that the Petro Evaluation agreement "would require RLH to assume prepetition obligations and liability [the Debtors] incurred." (Compl. ¶ 82.) Upon learning of the Petro Evaluation contracts, RLH advised the Debtors that such agreement would be excluded from the Acquired Assets. (*Id.* ¶¶ 82-83.) RLH makes similar allegations concerning the Gasearch contracts, which RLH alleges were established by D & L Energy, Inc. insiders Susan Faith and Ben Lupo to "overcharge[] investors to their personal benefit. As promptly as [RLH] discovered the existence and understood the import of the [Gasearch] contracts, RLH provided [the Debtors] formal notice that it will not accept an assignment of any Gasearch contract." (*Id.* ¶ 84.) Since RLH had the sole discretion to exclude any one or more of the Acquired Assets through the date of Closing (see APA § 3.1.5), it is hard to imagine a scenario whereby RLH could have been damaged as a result of the Debtors' failure to

cooperate in disclosing the Petro Evaluation or the Gasearch contracts outside the Due Diligence Period. As permitted by the APA, RLH expressly states that it gave notice to the Debtors that it was excluding the Petro Evaluation and the Gasearch contracts. RLH argues that it was damaged because it learned of the Petro Evaluation contracts and the Gasearch contracts after the time period in which it was required to identify the executory contracts that were to be assumed and assigned to it.<sup>14</sup> There is no allegation, however, that this late disclosure actually damaged RLH. Indeed, the Debtors have not moved to assume any of these agreements and, as such, they cannot be assigned to RLH.

RLH's Complaint includes Second Section F on page 30,<sup>15</sup> which is styled, "[The Debtors] Decline to Extend Due Diligence and Permit Additional Time to Effect a Cure of Their Breaches." In Second Section F, RLH complains that the Debtors "declined to extend the Due Diligence period to allow the parties to attempt to resolve some of the outstanding issues."<sup>16</sup> (Compl. ¶ 87.) RLH

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<sup>14</sup> Paragraph K of the findings in the Sale Order states that RLH had ten days after the expiration of the Due Diligence Period to identify each of the contracts to be assumed by the Debtors and assigned to RLH. (Sale Order at 6.) There is no comparable time period for RLH to exclude any contract that it did not wish to have assigned to it; however, Section 3.1.5 permits RLH to exclude any one or more of the Acquired Assets through the date of Closing.

<sup>15</sup> The Complaint contains a Section F starting on page 26. This second Section F starts at page 30 and is followed by a second Section G on page 32. Following the second Section G, RLH continues with Section I. For the sake of clarity, the Court will refer to the Section F on page 30 as Second Section F.

<sup>16</sup> There is no support in the APA for RLH's assertion that the Due Diligence Period existed for the purpose of resolving outstanding issues. Pursuant to the express terms of Section 3.1.1, the Due Diligence Period existed for RLH

asserts that, by refusing to extend the Due Diligence Period, the Debtors "unnecessarily increase[d] RLH's costs and expenses of due diligence [and] forced RLH to provide notice of the Defects in all of the Schedule 3.1.6 assets because of [the Debtors'] inability to reasonably document what they owned and its status." (RLH's Resp. at 17.) It is not clear whether RLH intended Second Section F to state a cause of action for breach of contract. Since there was no obligation on the part of the Debtors to extend the Due Diligence Period, there can be no breach – material or otherwise – resulting from the Debtors' declination to extend the Due Diligence Period. As a consequence, as a matter of law, the Debtors' refusal or declination to extend the Due Diligence Period cannot state a cause of action for breach of contract.

As set forth above, the Complaint is devoid of any facts regarding any damages incurred by RLH as a result of the Debtors' breach of the duty to cooperate with RLH during the Due Diligence Period. The Complaint contains merely conclusory allegations of increased – yet unexplained and undocumented – expenses RLH incurred in conducting due diligence. Because the Complaint fails to allege facts to support each of the elements of a cause of action for breach of contract regarding the Debtors' failure to

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"to conduct such due diligence as Buyer may determine is necessary and appropriate." (APA § 3.1.1.) No other purpose is given.

cooperate, judgment on the pleadings in favor of the Debtors is appropriate.

### **3. ODNR Litigation**

In Section 5.7, the Debtors make the following warranties regarding the salt water disposal wells:

5.7 Salt Water Disposal Wells. Sellers are unaware of any issue that would prevent the Ohio Department of Natural Resources from issuing an operational permit to Buyer. Sellers represent that the improvements to the assets described in Schedule 3.1.6, subparagraph (2) were approved by the Ohio Department of Natural Resources in accordance with the rules and regulations of the State of Ohio in force at the time the improvements were made.

(APA § 5.7.) RLH asserts that, by making the representation in Section 5.7, “[the Debtors] invoked the Knowledge requirements of the APA.” (Compl. ¶ 100.) “Knowledge” is defined in Section 1.5.3 as “the actual knowledge of Sellers, and the knowledge that each such person would have reasonably obtained in the performance of each such person’s duties as Chief Executive Officer, President, and other executive officers of the Sellers.” (APA § 1.5.3.)

RLH acknowledges that the Debtors disclosed in the APA that the ODNR had revoked the Debtors’ permits to operate the three salt water disposal wells.<sup>17</sup> However, RLH argues that, in contravention of the Debtors’ warranty that they were unaware of any issues that would prevent the ODNR from issuing operational

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<sup>17</sup> Footnote 1 on page 13 of the APA states, “Buyer acknowledges that the State of Ohio has revoked the saltwater injection permits held by D&L Energy.” (APA at 13 n.1.)

permits to RLH, the Debtors (i) failed to disclose the existence of litigation between the Debtors and the ODNR that impacts whether the Debtors' salt water disposal wells will ever be permitted by the ODNR; and (ii) mischaracterized the moratorium placed on salt water disposal wells by the ODNR. RLH states that the salt water disposal wells are "saddled with additional operational, regulatory and environmental claims and obligations. . . . ODNR's representatives expressed skepticism that the wells would ever be permitted." (Compl. ¶ 105.)

The Debtors assert that they did not warrant that the ODNR would issue operational permits; only that the Debtors did not have knowledge of any issues that would prevent the ODNR from issuing such permits. The alleged "skepticism" on the part of ODNR representatives cannot be attributed to the Debtors and does not preclude the permitting of the salt water disposal wells. Moreover, because RLH knew that the Debtors' operational permits had been revoked by the ODNR, the status of any litigation seeking to reinstate those permits was immaterial and not contrary to the representations set forth in Section 5.7. Finally, the Debtors state that RLH does not allege that any statement made by the Debtors was untrue or that the Debtors possessed knowledge that the ODNR would not issue permits.

In the Response, RLH notes that the ODNR filed an objection to the Debtors' sale motion before RLH submitted a bid to purchase

the Debtors' assets. (See Main Case, Doc. 244 ("ODNR Objection").) The ODNR made two assertions in the ODNR Objection that the Debtors failed to disclose to RLH: (i) the Debtors could be required to abandon the salt water disposal wells consistent with the Ohio Administrative Code; and (ii) the ODNR did not consent to the elimination of the Debtors' or any transferee's environmental liabilities. RLH argues that the ODNR's position was not consistent with the Debtors' warranty that they were unaware of any issues that would prevent the ODNR from issuing operational permits to RLH. The Debtors counter that they were not required to disclose to RLH statements in pleadings filed with the Court by the ODNR, particularly when the ODNR Objection was resolved by the Court in its Bid Procedures Order.

The Court finds and holds that RLH's allegation about an expression of skepticism by an unidentified representative of the ODNR concerning the future permitting of the salt water disposal well does not and cannot, as a matter of law, establish that the Debtors had Knowledge that was contrary to the warranty in Section 5.7.

To the extent RLH claims a material breach because the Debtors did not disclose the contents of the ODNR Objection, this Court finds there are not sufficient facts in the Complaint to render judgment. The ODNR did not object to the sale of the Debtors' assets, *per se*, but asserted that the Court "should not" authorize

the sale of the Debtors' assets without "preserv[ing] all claims, including any contingent or unmatured claims, by ODNR and OEPA [Ohio Environment Protection Agency] against D & L Energy or any transferee of real property presently owned by D & L Energy that is the site of environmental violations." (ODNR Obj. at 3.) The ODNR Objection was resolved by the Bid Procedures Order entered on October 22, 2013, which provided:

The State of Ohio's right to further object to Debtors' Sale Motion is hereby preserved. Debtors shall reserve funds from the sale proceeds in the amount of \$1,620,013.00, until such time as the amount of any claim the State of Ohio may have is determined.

(Bid Procedures Order at 4.) Although the ODNR Objection was resolved prior to the auction and execution of the APA, there is a question of fact regarding whether the Debtors had Knowledge that would affect the warranty in Section 5.7.

RLH also asserts that the Debtors materially breached Section 5.6, which states, "To Sellers' Knowledge, none of the Acquired Assets are currently operating, or have previously operated, in material contravention to any environmental laws, other than as disclosed on Schedule 5.6."<sup>18</sup> (APA § 5.6.) RLH asserts that the ODNR Objection and the recognized environmental conditions discovered at the salt water disposal wells show that this representation was not true. As with Section 5.7, the Court finds

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<sup>18</sup> Schedule 5.6 lists "None" for environmental liabilities.

that there are questions of fact regarding the Debtors' Knowledge about whether any of the Acquired Assets had been previously "operated[] in material contravention of any environmental laws" at the time the parties executed the APA.

RLH further makes arguments concerning recognized environmental conditions relating to the salt water disposal wells as being material. However, the Complaint asserts that these conditions are Defects, subject to Purchase Price Reductions, rather than breaches of the APA that would give rise to a right to terminate the APA. As a consequence, this Court need not address the recognized environmental conditions in ruling on the Debtors' Motion.

Because there are questions of fact regarding the Debtors' Knowledge at the time they made the representations in Sections 5.6 and 5.7, judgment on the pleadings is not appropriate.

#### **B. Anticipatory Repudiation**

RLH and the Debtors dispute and take vastly different positions concerning the interpretation and the extent of interrelatedness of Sections 3.1.5 and 3.1.6 of the APA. However, resolution of that issue is not presently before the Court. Instead, RLH argues that the Debtors anticipatorily repudiated the APA in their interpretation of those two Sections, which state:

3.1.5 Results of Examination. Buyer may, at any time following the Effective Date and through the date of Closing, exclude any one or more of the Acquired Assets

listed on Schedule 1.1(a), or any one or more of the contracts identified on Schedule 1.1(b), all in Buyer's sole discretion, based on the results of the due diligence authorized in Section 3.1.

3.1.6 Reduction in Purchase Price. If Buyer during its Due Diligence Period determines there to be a Defect, as defined in Schedule 3.1.6, with any of the Acquired Assets listed on Schedule 3.1.6 it shall have the right to reduce the Purchase Price by the Purchase Price Reduction Amount, as defined on Schedule 3.1.6. The Buyer shall deliver written notice of any Defect to the Sellers and the Sellers shall have five (5) days thereafter in which to notify Buyer of Sellers' intent to cure. Sellers shall have a right to cure any defect within one hundred twenty (120) days after receipt of Buyer's notice of defect, unless Buyer agrees in writing to an extension which shall in no event exceed ninety (90) days. Any request of Sellers to Buyer for an extension of time to cure a Defect shall not be unreasonably withheld. The Sellers shall not be permitted to cure any Defect through tender or payment of a cash payment. Sellers' obligation to cure a Defect as to which they provided timely notice shall survive the Closing. The aggregate Purchase Price Reduction Amount, for any Defect which is not cured by the Sellers, must exceed five percent (5%) of the Purchase Price for any purchase price reduction to be provided to Buyer. In the event the Purchase Price reduction exceeds five percent (5%) of the Purchase Price, then Buyer shall be credited with the full aggregate Purchase Price Reduction Amount under Schedule 3.1.6, up to fifty percent (50%) of the Purchase Price. Should the Purchase Price Reduction Amount exceed fifty percent (50%) of the Purchase Price, then Buyer shall have, in its sole discretion, the right to terminate the Agreement and receive a complete and full refund of the Two Million Seventy Thousand Dollars (\$2,070,000) Deposit Amount without setoff or deduction.

(APA §§ 3.1.5, 3.1.6.)

RLH characterizes Section 3.1.6 and the corresponding Schedule 3.1.6 as a formula to determine the Purchase Price Reductions for certain assets that were determined to be Defects.

"Sellers took the position that, where RLH had identified a Defect and was entitled to a price reduction for a particular assets [sic], Sellers were no longer required to convey the asset and could exclude it from the Acquired Assets." (Compl. ¶ 94.) RLH notes that Excluded Assets, as defined in Section 1.2, does not include assets subject to a Defect. RLH concludes:

Given Sellers' position on the operation of Section 3.1.6 of and Schedule 3.1.6 to the APA – and the importance of those provisions to the APA structure governing both pricing and the definition of those portions of the Acquired Assets, as well as to any closing that might occur – Sellers' have anticipatorily repudiated the APA.

(*Id.* ¶ 98.)

The Debtors state that "RLH advances an improper interpretation of Section 3.1.6 and Schedule 3.1.6 of the APA. Even if [sic] were not the case, however, a disagreement regarding interpretation of the APA is not grounds for termination. The dispute should have been submitted to this Court for resolution." (Debtors' Mot. at 16.) The Debtors point out that RLH has, in fact, asked the Court to issue a declaratory judgment regarding Section 3.1.6, but RLH did so only after termination of the APA.

Regarding their interpretation of the price reduction mechanism in the APA, the Debtors argue:

Although, pursuant to 3.1.5, RLH is entitled to exclude any asset it wishes from Closing according to its due diligence findings, it is entitled to a reduction in the purchase price in connection with the excluded asset only if the excluded asset has an uncured defect as

provided in Section 3.1.6, as further defined in Schedule 3.1.6.

Reading Paragraphs 3.1.5 and 3.1.6 of the APA in tandem, and the APA as a whole, the reciprocal is also true under the APA – RLH is not entitled to a price reduction concerning an asset unless it chooses to exclude that asset from transfer at Closing.

(*Id.* at 17.) The Debtors state that the total price reductions in Schedule 3.1.6 approximate the Purchase Price; thus, “it would be manifestly absurd to read the APA to allow RLH to require Debtor to transfer its assets and receive no value for those assets in return.” (*Id.* at 18.) The Debtors again explain their interpretation of the price reduction formula as follows:

RLH is entitled to exclude any asset which it does not wish to have transferred at Closing. See Section 3.1.5 of the APA. Where RLH chooses to exclude an asset from transfer, it is entitled to a price reduction only if the asset qualifies for a price reduction under Section 3.1.6 of the APA. Before RLH can claim a price reduction for an asset that it would exclude based on Section 3.1.6 and Schedule 3.1.6, RLH is first required to allow Debtor an opportunity to cure the “defect” for which it will claim a price reduction. If a noticed defect under Schedule 3.1.6 exists, and Debtor states that it does not intend to cure the alleged defect, RLH has two choices: (1) to exclude the asset and benefit from any applicable price reduction off of the \$20.7 million purchase price, or (2) to waive the defect by choosing not to exclude the asset from transfer. See Section 7.1 of the APA.

(*Id.* at 19.)

In the Response, RLH reiterates, “When the parties defined Excluded Assets, they did not include assets for which RLH provided a Section 3.1.6 notice of Defect, assets subject to

uncured/unwaived Defects, or any reference to Section 3.1.6.” (RLH’s Resp. at 18.) In contrast, the APA provides in Section 1.1 that RLH may exclude a joint venture listed on Schedule 1.1(a) or an executory contract listed on Schedule 1.1(b), which would then become an Excluded Asset. In either instance, the APA expressly states that RLH’s election to exclude a joint venture or an executory contract “shall not reduce the Purchase Price.” (APA § 1.1.)

So, in Section 1.1(b) [sic] the parties expressly stated that for those entirely different categories of assets, RLH would not be entitled to any manner of price reduction – and, with that verbiage further distinguished them from assets that were the subject of Section 3.1.6 for which there was a potential price reduction (if between 5% and 50% of the Purchase Price, and if the noticed Defects remained uncured and unwaived).

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. . . [W]hen the parties intended to move an Acquired Asset to an Excluded Asset, they knew both the language and mechanisms to use to accomplish that result. They did not use that language or provide those mechanisms for Section 3.1.6 assets subject to Defects, which demonstrates they did not intend to do so.

(RLH’s Resp. at 19-20 (citation omitted).)

Regarding anticipatory repudiation, RLH argues that “whether [the Debtors] repudiated the contract is usually a question of fact that this Court cannot properly resolve on a motion for judgment on the pleadings.” (*Id.* at 20.) RLH states that it has properly pled a claim for anticipatory repudiation, such that

granting the Debtors' Motion with respect thereto would be improper. "[The Debtors'] position that RLH must either (1) purchase the [held by production] assets subject to Defects, or (2) return the assets to [the Debtors] and only then receive a Purchase Price reduction, breaches Section 3.1.6 and presents an unresolvable bar to Closing." (*Id.* at 21.) Finally, RLH states that neither the APA nor Ohio law requires RLH to adjudicate the existence of breaches of the APA prior to declaring those breaches and exercising its election to terminate the APA.

This Court cannot find that, as a matter of law, RLH has not stated a claim that the Debtors anticipatorily repudiated the APA. There are questions of fact regarding the interpretation of Sections 3.1.5 and 3.1.6 that cannot be determined on a motion for judgment on the pleadings.<sup>19</sup>

While it may have made sense for the parties to seek a determination from this Court concerning their widely divergent interpretations of Sections 3.1.5 and 3.1.6 prior to Closing, they were not required to do so. If RLH is incorrect regarding its claim for anticipatory breach of contract,<sup>20</sup> its notice of termination and refusal to close will be found to be a material

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<sup>19</sup> The Court notes that Section 3.1.6 is not a model of clarity. One sentence therein states: "Any request of Sellers to Buyer for an extension of time to cure a Defect shall not be unreasonably withheld." (APA § 3.1.6.) It appears there is language missing from this sentence, which literally states that the Debtors should not unreasonably withhold a request, on their part, of RLH.

<sup>20</sup> Providing that RLH has not established any other material breach of the APA that would permit it to terminate the contract.

breach of the APA. *Holmes v. Wilson*, No. 2:08-cv-602, 2010 WL 1433169, at \*4 (S.D. Ohio Apr. 2, 2010) (“Defendant Buyers committed a material breach by informing Plaintiff Sellers that they intended to terminate the Purchase Contract prior to the closing date, thereby defeating the purpose of the contract. The Plaintiff Sellers were then entitled to stop performance . . . .”). In waiting to tee up this issue, RLH takes the risk that its interpretation of the APA may be held to be incorrect, resulting in RLH being the materially breaching party.

#### **IV. CONCLUSION**

As set forth above, the Court will grant the Debtors judgment on the pleadings on RLH’s claim that the Debtors’ failure to cooperate during the Due Diligence Period constitutes a material breach of the APA because such cause of action fails to allege facts in support of damages, which is one of the four elements of a cause of action for breach of contract. The Court finds that the Debtors’ inability to convey the Noble County Leases does not constitute a breach regarding title, as warranted in Section 5.3. The Court further finds that there are issues of fact that preclude judgment on the pleadings regarding RLH’s claims that (i) conveyance of the Noble County Leases is so fundamental to the essential purpose of the APA that the Debtors’ inability to convey such leases constitutes a material breach of contract; (ii) the Debtors breached the APA by misrepresenting their Knowledge

regarding future permitting of the salt water disposal wells, as warranted in Section 5.7; (iii) the Debtors breached the APA by misrepresenting their Knowledge regarding environmental liabilities, as warranted in Section 5.6; and (iv) the Debtors anticipatorily breached the APA in their interpretation of Sections 3.1.5 and 3.1.6. To the extent any other issue has been raised in the Debtors' Motion, but not addressed in this Memorandum Opinion, judgment on the pleadings will be denied.

An appropriate order will follow.

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**ORDER GRANTING, IN PART, AND DENYING, IN PART,  
DEBTORS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**  
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Before the Court is Motion for Partial Judgment on the Pleadings of Plaintiff's Complaint ("Debtors' Motion") (Doc. 20) filed by Debtors/Defendants/Counter-Claimants D & L Energy, Inc. and Petroflow, Inc. ("Debtors") on July 9, 2014. On July 28, 2014, Plaintiff/Counter-Defendant Resource Land Holdings, LLC ("RLH") filed Opposition and Response to Sellers' Motion for Partial Judgment on the Pleadings of Plaintiff's Complaint (Doc. 35). The Debtors filed Reply to Resource Land Holding LLC's Response to Motion for Partial Judgment on the Pleadings of Plaintiff's Complaint (Doc. 40) on August 4, 2014.

By way of background, on May 30, 2014, RLH filed Complaint for Declaratory Judgment (Doc. 1), which commenced this adversary proceeding. On June 16, 2014, the Debtors filed Answer to Complaint (Doc. 7) and Counterclaim Against Plaintiff Resource Land Holdings, LLC (Doc. 9). On July 7, 2014, RLH filed Amended Reply to Counterclaim (Doc. 19).

For the reasons set forth in the Court's Memorandum Opinion Regarding Debtors' Motion for Partial Judgment on the Pleadings ("Memorandum Opinion") entered on this date, the Court hereby:

1. Finds that RLH has failed to state a claim that the Debtors' alleged failure to cooperate during the Due Diligence Period constitutes a material breach of the APA;

2. Finds that the Debtors' inability to convey the Noble County Leases does not constitute a breach regarding title, as warranted in Section 5.3;

3. Grants the Debtors' Motion with respect to the findings in paragraphs 1 and 2, above;

4. Finds that there are issues of fact regarding whether:

a. the Debtors' inability to convey the Noble County Leases constitutes a material breach of the APA,

b. the Debtors breached the APA by misrepresenting their Knowledge regarding future permitting of the salt water disposal wells, as warranted in Section 5.7,

c. the Debtors breached the APA by misrepresenting their Knowledge regarding environmental liabilities, as warranted in Section 5.6, and

d. The Debtors anticipatorily breached the APA in their interpretation of Sections 3.1.5 and 3.1.6;

5. Denies the Debtors' Motion with respect to the findings in paragraph 4, above; and

6. Denies the Debtors' Motion with respect to any issues not addressed in this Order and accompanying Memorandum Opinion.

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