

EL PASO E&P COMPANY, L.P. f/k/a : **DOCKET NO. 69105**
EL PASO PRODUCTION COMPANY, :
L.P. :
: :
VERSUS : **26TH JUDICIAL DISTRICT COURT**
: :
DCP MIDSTREAM, LP f/k/a :
DUKE ENERGY FIELD SERVICES, :
LP, AND DCP ASSETS HOLDING, LP : **WEBSTER PARISH, LOUISIANA**

PEREMPTORY EXCEPTION OF *RES JUDICATA*
OR IN THE ALTERNATIVE, DECLINATORY
EXCEPTION OF *LIS PENDENS* AND MOTION TO STAY

NOW INTO COURT, through undersigned counsel, come defendants, DCP MIDSTREAM, LP and DCP ASSETS HOLDING, LP (collectively, “DCP”), who respectfully file this Peremptory Exception of *Res Judicata* or in the Alternative, Declinatory Exception of *Lis Pendens* and Motion to Stay, and represent as follows:

1.

The Petition (the “Louisiana Petition” or “La. Pet.”) was filed in this Court on March 5, 2009 (the “Louisiana Suit”). Prior to the filing of the Louisiana Suit, plaintiff, EL PASO E&P COMPANY, L.P. (“El Paso” or “plaintiff”), filed a nearly identical suit arising out of the same alleged course of conduct in Houston, Harris County, Texas on November 21, 2006, styled “El Paso E&P Company, L.P. f/k/a El Paso Production Company, L.P. v. Duke Energy Field Services L.P. and DCP Assets Holding, LP, Cause No. 2006-74349 (“the Texas Suit”). A certified copy of the Petition filed in that proceeding (the “Texas Petition” or “Tex. Pet.”) is attached hereto as **Exhibit A**. As explained below, a trial has been completed and Judgment has been rendered in the Texas Suit.

2.

At issue in both suits are El Paso’s claims of breach by DCP of the April 4, 1990 Gas Gathering, Processing and Purchase Agreement (the “Agreement”) between DCP’s and El Paso’s respective predecessors-in-interest. Just as here, El Paso alleged in the

Texas Suit that DCP breached the Agreement by failing to properly account to El Paso for: the liquids, drip (condensed hydrocarbons) recovered at or after the inlets to the gas plants, the flash gas off these condensed hydrocarbons, pipeline imbalances, fuel condensed at DCP's fractionation plant, and underallocation of residue and plant products. (Tex. Pet., ¶ 15; La. Pet., ¶¶ 5-12; 15).

3.

Prior to impaneling a jury in the Texas Suit, the court granted partial summary judgment to DCP precluding El Paso's recovery of damages for periods in or before October 2002 on the grounds that El Paso's claims related to those periods were barred by the statute of limitations. A certified copy of the Order Granting DCP's Partial Summary Judgment is attached hereto as **Exhibit B**. The court's partial summary judgment ruling--although limiting El Paso's potential recovery of damages--did not dispose of El Paso's breach claims against DCP. *See Exhibits A and B*.

4.

Under the Texas Rules of Civil Procedure, El Paso had the unconditional right to non-suit its breach claims at any time before El Paso introduced all of its evidence other than rebuttal evidence. *See* Tex. R. Civ. P. art. 162. El Paso thus could have elected to non-suit its claims that DCP had breached the Agreement by failing to properly account for all plant products even after the Texas court granted partial summary judgment and El Paso learned that its recovery would be limited. But El Paso chose to pursue its breach claims in its chosen Texas forum, ultimately obtaining a judgment against DCP for more than \$4.4 million. A certified copy of the Final Judgment rendered by the court in the Texas Suit is attached hereto as **Exhibit C**.

5.

The Texas Final Judgment incorporates the jury's verdict which includes findings that DCP failed to comply with the Agreement as to Condensate, Flash Gas, Fractionation

Fuel, Allocation regarding Residue Gas, and ALIP Imbalance. *See Exhibit C.* Over DCP's objection, the breach question submitted to the jury was not limited to any particular time frame. *Id.* At El Paso's insistence, the entirety of El Paso's breach claim was tried in Texas, and the Texas Final Judgment reflects El Paso's recovery on the identical breach claims it now has re-filed in this Louisiana Suit. *See Louisiana Petition, Exhibit A and Exhibit C.*

6.

After the Texas jury returned its verdict, El Paso filed the Louisiana Suit alleging identical breach claims to recover damages that the partial summary judgment and the Final Judgment held were time-barred. El Paso also alleges entitlement to additional damages based on the same breach allegations for a prior time period not expressly alleged in the Texas Suit, *i.e.*, from February, 1999 to October, 2002 (La. Pet., ¶¶ 14-15).

7.

Since El Paso filed the Louisiana Suit, it has advised the Texas court that it intends to appeal the granting of the motion for partial summary judgment in the Texas Suit. A copy of pertinent excerpts of the transcript of the March 27, 2009 hearing in the Texas Suit reflecting that intention is attached hereto as **Exhibit D**. Likewise, DCP intends to appeal the Texas Final Judgment.

8.

On May 8, 2009, El Paso filed "Plaintiff's Motion to Modify the Judgment and Response to Defendants' Motion to Modify Judgment" in which El Paso seeks to modify the Texas court's Judgment, including that part of the Judgment granting DCP's partial summary judgment and omitting "Plaintiff's recovery for defendant's breach of the agreement prior to November, 2002." Plaintiff's Motion, ¶ 7. A true and correct copy of the El Paso's Motion is attached hereto as **Exhibit E**. By this Motion, El Paso is still

seeking recovery in Texas of damages for the period August 2000 to October 2002 -- part of the very same period for which recovery is sought here.

9.

This Court should grant DCP's Peremptory Exception of *Res Judicata* and dismiss the Louisiana Suit. There is a valid, final judgment in the Texas Suit, the parties in the Louisiana and Texas Suits are identical, and the cause of action in the Louisiana Suit arises out of the same transaction, the same conduct and the same allegations of breach that are the subject matter of the Texas Suit.

10.

Alternatively, DCP respectfully requests that this Court grant its Declinatory Exception of *Lis Pendens* and Motion to Stay and stay the Louisiana Suit pursuant to LA. CODE CIV. P. art. 532. The Texas appellate process has not been completed and it would be a waste of Louisiana judicial resources to proceed to the merits of El Paso's Petition in this case while appeals are pending in the Texas Suit.

WHEREFORE, DEFENDANTS, DCP MIDSTREAM, LP f/k/a DUKE ENERGY FIELD SERVICES, LP, and DCP ASSETS HOLDING, LP, PRAY that PLAINTIFF, EL PASO E&P COMPANY, L.P., be served with this Peremptory Exception of *Res Judicata* or in the Alternative, Declinatory Exception of *Lis Pendens* and Motion to Stay, and that an Order be issued herein directing plaintiff to show cause, if any it can, why this Peremptory Exception of *Res Judicata* or in the Alternative, Declinatory Exception of *Lis Pendens* and Motion to Stay should not be granted and plaintiff's suit dismissed with prejudice, or alternatively, why an Order should not issue staying this action until a final and non-appealable Judgment has been rendered in the Texas Suit.


DEFENDANTS FURTHER PRAY that after due proceedings are had on these Exceptions, that their Peremptory Exception of *Res Judicata* be granted and plaintiff's suit be dismissed with prejudice at plaintiff's cost, or IN THE ALTERNATIVE, that their

Declinatory Exception of *Lis Pendens* and Motion to Stay be granted and that an Order issue herein staying this action until a final and non-appealable Judgment has been entered in the Texas Suit.

DEFENDANTS FURTHER PRAY for all orders and decrees necessary in the premises and for full, general and equitable relief.

Shreveport, Louisiana, this 11th day of May, 2009.

BLANCHARD, WALKER, O'QUIN & ROBERTS
(A Professional Law Corporation)

By: 
W. Michael Adams, Bar #2338
Susannah Walter Poljak, Bar #29048

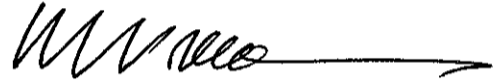
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ATTORNEYS FOR DEFENDANTS,
DCP MIDSTREAM, LP and DCP ASSETS
HOLDING, LP

CERTIFICATE

I HEREBY CERTIFY that copies of the foregoing Peremptory Exception of *Res Judicata* or in the Alternative, Declinatory Exception of *Lis Pendens* and Motion to Stay, Rule to Show Cause and Memorandum in support thereof have been served upon plaintiff, EL PASO E&P COMPANY, L.P., through its counsel of record, F. John Reeks, Jr., Bradley Murchison Kelly & Shea LLC, 10th Floor, Louisiana Tower, 401 Edwards Street, Shreveport, Louisiana 71101-5529, via hand delivery.

Shreveport, Louisiana, this 11th day of May, 2009.



W. Michael Adams