

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SemCrude, L.P., et al.,	Case No. 08-11525 (BLS)
Reorganized Debtors.	(Jointly Administered)
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New Dominion, LLC,	Adv. No. 11-51774 (BLS)
Plaintiff,	Related to Adv. Docket Nos.:
v.	21, 43, & 44
J. Aron & Company,	
Defendant.	

Proposed Findings of Fact and Conclusions of Law¹

Before the Court is the Motion for Partial Summary Judgment (the “Motion”) filed by New Dominion, LLC. This adversary proceeding is part of the continuing fallout from the 2008 collapse of SemCrude, LP,² an oil and gas conglomerate that placed big bets in the oil futures markets, lost, and could not pay its debts.

In the weeks before SemCrude filed for bankruptcy it bought oil from New Dominion, an Oklahoma-based oil and gas producer. But

¹ The Court has jurisdiction over this matter, 28 U.S.C. §§ 1334(b), 157(a), (c)(1), and venue is proper here, 28 U.S.C. §§ 1408, 1409. As the Court has previously ruled, this adversary proceeding constitutes a non-core (i.e., “related-to”) proceeding. *Arrow Oil & Gas v. J. Aron & Co. (In re SemCrude)*, 442 B.R. 258, 271 (Bankr. D. Del. 2010). Thus, in accordance with 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033, the Court will submit the following to the District Court as proposed findings of fact and conclusions of law.

² For simplicity’s sake, here the term “SemCrude” means all of the SemGroup-related entities that filed for bankruptcy in this Court in July 2008.

because of the bankruptcy SemCrude never paid New Dominion in full for the oil it purchased. With further payment from SemCrude not forthcoming, New Dominion sued J. Aron & Company, claiming that J. Aron acquired some of New Dominion's oil from SemCrude, sold it, and kept the proceeds for itself. According to New Dominion, J. Aron's actions violated an Oklahoma statute that says proceeds from New Dominion's oil belong to New Dominion, and which grants New Dominion a lien on those proceeds until it is repaid in full. J. Aron denies all of this, saying that it holds no such proceeds, and that even if it did, its rights trump those of New Dominion.

New Dominion has moved for partial summary judgment on three issues of Oklahoma law that, if decided in its favor, ultimately may make its case easier to prove. For the reasons that follow, the Court will grant the Motion, but only on one of those three issues. Specifically, the Court finds that, under Oklahoma law, New Dominion has a properly perfected security interest in and lien on the proceeds of the oil it sold to SemCrude. But because the other two issues raised in the Motion involve disputed facts, they cannot be resolved on summary judgment.

I. BACKGROUND³

Before its descent into bankruptcy in July 2008, SemCrude's business involved purchasing oil and gas from upstream producers and selling it to downstream purchasers. After the bankruptcy filing, many upstream producers were owed millions of dollars for oil and gas that they had delivered to SemCrude in the weeks leading up to the filing. New Dominion is among those unpaid producers. It claims it was not

³ Because of the long and complex history of SemCrude's bankruptcy case – not to mention the run-up to it – the Court recites only those facts relevant to the Motion. See *Samson Res. Co. v. SemCrude, L.P. (In re SemCrude, L.P.)*, 407 B.R. 140, 143-48 (Bankr. D. Del. 2009) (describing SemCrude's business operations and financial collapse).

paid in full for more than 22,000 barrels of oil, worth roughly \$2.75 million, that it provided to SemCrude between June 1 and July 1, 2008.⁴

Shortly after New Dominion learned of SemCrude's bankruptcy, the Oklahoma-based company filed liens under the now-repealed Oklahoma Oil and Gas Owners' Lien Act, Okla. Stat. Ann. tit. 52, §§ 548-548.6, *repealed by* Okla. Stat. Ann. tit. 52, §§ 549.1-549.12.⁵ (the "Oklahoma Oil & Gas Lien Act" or the "Act"). That statute granted producers like New Dominion "a lien upon the oil or gas severed [from its wells], or the proceeds of sale if such oil or gas has been sold, to the extent of [its] interest until" full payment is received. *Id.* at § 548.2.

Though New Dominion eventually received roughly \$400,000 as part of a settlement with SemCrude's bankruptcy estate, the record reflects that about \$2.35 million remains unpaid. To recover that money, New Dominion—alongside several other unpaid producers—sued J. Aron,⁶ a downstream purchaser that bought oil from SemCrude in Oklahoma during the June 1 to July 1, 2008 timeframe. New Dominion contends that some of its oil wound up with J. Aron, was sold, and that now J. Aron holds the proceeds. New Dominion thus wants to foreclose on its asserted lien to recover proceeds it claims J. Aron has retained.

In moving for partial summary judgment, New Dominion asks the Court to find that, as a matter of law:

1. It holds properly perfected liens on the oil (and its proceeds) New Dominion sold to SemCrude from June 1, 2008 to July 1, 2008, under the Oklahoma Oil and Gas Lien Act;

⁴ The record reflects that New Dominion was paid in full for oil delivered between July 2, 2008 and July 21, 2008 pursuant to the administrative priority provisions of 11 U.S.C. § 503(b)(9).

⁵ In 2010, the Oklahoma Oil & Gas Lien Act was repealed and replaced by a new act. *See* Okla. Stat. Ann. tit. 52, §§ 549.1-549.12. But because New Dominion filed suit against J. Aron in 2009, the now-repealed statute applies, and is discussed here.

⁶ New Dominion's lawsuit, originally filed in Oklahoma state court, was removed to federal court in Oklahoma and later transferred here.

2. J. Aron holds proceeds to which New Dominion's asserted liens attach; and
3. New Dominion's rights to those proceeds trump J. Aron's.

In response, J. Aron first urges the Court to address J. Aron's own motion for summary judgment, which it filed in several producer-initiated adversary proceedings (including this one), and which the Court has ordered held in abeyance pending further discovery. Should the Court choose not to grapple with J. Aron's summary judgment motion now, J. Aron argues that New Dominion's purported lien is ineffective because it did not abide by the notice provision of the Oklahoma Oil & Gas Lien Act. J. Aron also says that New Dominion cannot show how much, if any, of the oil J. Aron purchased came from its wells, or that J. Aron retains proceeds belonging to New Dominion. Finally, J. Aron argues that New Dominion's interpretation of the Act raises concerns under both the Due Process and Commerce Clauses of the United States Constitution.

The Court will begin its analysis by addressing J. Aron's request to renew its motion for summary judgment, which request will be denied, and will then turn to New Dominion's Motion.

II. LEGAL ANALYSIS

A. J. Aron's Motion for Summary Judgment Will Continue to be Held in Abeyance

In responding to the Motion, J. Aron asks the Court to take its own motion for summary judgment off the shelf and consider the arguments made there. While the Court fully appreciates that J. Aron would like to have its summary judgment motion decided, now is not the time. As noted above, this adversary proceeding is but one of several producer-initiated suits against downstream purchasers pending before the Court. Just recently, the parties agreed to, and the Court approved, a complex discovery protocol to coordinate and govern depositions and document production in multiple adversary proceedings involving scores of parties. That discovery process is by now well-underway and will extend through the spring. In deference to

that ongoing process, the Court will continue to hold J. Aron's summary judgment motion in abeyance, and consider here only the narrow issues of Oklahoma law on which New Dominion seeks partial summary judgment.⁷

B. Analysis of The Merits of the Motion

In the Motion, New Dominion moves for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or *the part of each claim or defense*—on which summary judgment is sought." (emphasis added)). The legal standard governing the Motion is a familiar one: Summary judgment is proper where, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in favor of that party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a);⁸ *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 422–23 (3d Cir. 2006). As previously noted, New Dominion seeks summary judgment on three issues; the Court will address each in turn.

1. New Dominion Holds Properly Perfected Liens Under the Oklahoma Oil & Gas Lien Act

The Court finds that New Dominion is entitled to partial summary judgment on the issue of whether, under the Oklahoma Oil & Gas Lien Act, it holds perfected liens on the proceeds from the sale of its oil.

⁷ To be clear: The Court expresses no opinion today on the merits of the arguments that J. Aron raised in its motion for summary judgment and re-urged in response to the Motion, including: (i) Whether J. Aron's contractual netting rights take precedence over New Dominion's lien rights, (JA Resp. pp. 6-10); (ii) Whether New Dominion waived its rights under the Oklahoma Oil & Gas Lien Act, (*id.* pp. 10-11); (iii) Whether J. Aron's "good-faith tender" bars New Dominion's claims under the Court's prior orders or the express terms of the Act, (*id.* pp. 12-13); (iv) Whether New Dominion's rights under the Act reach J. Aron, (*id.* pp. 13-15); and, (iv) Whether New Dominion failed to provide timely notice of its lien to J. Aron under the Act, (*id.* pp. 15-16).

⁸ Fed. R. Civ. P. 56(a), applies to adversary proceedings in bankruptcy cases through Fed. R. Bankr. P. 7056.

The Act says that

[t]o secure payment from the sale of oil or gas, an interest owner⁹ ... shall have a continuing security interest in and a lien upon the oil or gas severed, or *the proceeds of sale* if such oil or gas has been sold, to the extent of his interest until the purchase price has been paid to the interest owner.

Id. § 548.2(A) (emphasis added). To perfect a lien under the Act, the interest holder need only file timely notices in the appropriate county offices. *Id.* § 548.4(A).¹⁰

No one disputes that New Dominion has not been paid in full for the oil it sold to SemCrude from June 1 to July 1, 2008. The Act thus grants New Dominion a continuing lien on that oil and on the proceeds from the sale of it. In addition, New Dominion took the required steps to perfect its lien. (Mot. Ex. E.). None of this is in material dispute.

The Court finds, therefore, that New Dominion has a properly perfected lien under the Oklahoma Oil & Gas Lien Act, so partial summary judgment on that issue is appropriate. Whether that lien can be enforced against J. Aron is a separate question, which, for the reasons discussed below, the Court cannot dispose of today.

2. A Genuine Dispute of Fact Exists Over Whether J. Aron Received New Dominion's Oil

There can be no summary judgment on the issue of whether J. Aron retains proceeds that are subject to New Dominion's statutory lien. Under the Oklahoma Oil & Gas Lien Act, New Dominion's lien reaches proceeds held both by SemCrude—the "first purchaser" to buy New Dominion's oil—and any subsequent "purchasers" who bought

⁹ An "Interest owner" is someone "owning an entire or fractional interest of any kind or nature in the oil or gas at the time it is severed, or a person who has a right, either express or implied, to receive a monetary payment determined by the value of the oil or gas severed." Okla. Stat. Ann. tit. 52, § 548.1(3). The parties do not dispute that New Dominion qualifies as an interest owner.

¹⁰ Section 548.4(A) permits "[t]he interest owner [to] perfect the security interest and lien by filing of record in the office of the county clerk of the county in which the well is located a verified notice of lien"

New Dominion's oil from SemCrude. *See* Okla. Stat. Ann. tit. 52, §§ 548.1(5), 548.1(6), 548.2(C). But New Dominion's lien only attaches to the proceeds from its own oil. The Act is clear; it says that New Dominion's lien covers its own oil, and "the proceeds of sale if *such* oil or gas has been sold." *Id.* § 548.2(A) (emphasis added).

So, before New Dominion can lay claim to proceeds held by J. Aron—assuming without deciding that J. Aron holds proceeds—New Dominion must establish that at least some of the oil J. Aron got and sold came from New Dominion. In other words, New Dominion had to put evidence in the summary judgment record showing that a portion of the 22,000 barrels of oil it sold to SemCrude in June 2008 ultimately ended up among the barrels that SemCrude later sold to J. Aron. This New Dominion did not do. Instead, it tacitly asks the Court to assume some of its oil wound up at J. Aron because " J. Aron purchased [oil] from SemCrude for delivery in Cushing, Oklahoma," (Mot. ¶ 2), and New Dominion's oil "was delivered to SemCrude facilities in Cushing" (*id.* ¶ 1). New Dominion does not allege, however, that it was the only company supplying oil to SemCrude in Cushing during the relevant time period. And J. Aron voices doubt in its response that New Dominion can show that any of the oil J. Aron purchased originated from New Dominion's wells. (*See* JA Resp. p. 3.)

New Dominion claims that its inability to trace is not dispositive because oil is a homogeneous and fungible commodity that, once mixed with other oil, is impossible to trace. New Dominion argues for the Court to apply an "equitable rule" requiring "distribution ... [to] be made on a pro rata basis." (Mot. ¶ 18.) Under such a theory, J. Aron would have to pay New Dominion an amount based on the percentage of all the oil in Cushing that J. Aron purchased from SemCrude during the relevant time period. For instance New Dominion claims that "J. Aron purchased 59.662% of the oil sold by SemCrude" in June 2008, "so equitably, J. Aron ... [holds] ... 59.662% of [New Dominion's] proceeds." (Mot. ¶ 18.) But even if the Court were to accept New Dominion's equitable theory as the correct way of figuring J. Aron's liability — something the Court need not do today — summary

judgment would still be inappropriate. That is because the Court agrees with J. Aron that New Dominion's liability calculations are based on facts that are currently in dispute, "the subject of ongoing discovery, and ...likely to be hotly contested" at trial. (JA Resp. pp. 18-19.)

For example, New Dominion claims that a single document, Exhibit C to the Motion, establishes the quantity and the price of the oil J. Aron acquired from SemCrude in June 2008. And it cites the same document when it asserts that J. Aron purchased 59.662% of the oil sold by SemCrude that month. But J. Aron has challenged the provenance and the significance of Exhibit C, and the Court concludes that that document, standing alone in the summary judgment record, does establish those consequential facts beyond dispute.

Ultimately, while the Court agrees that New Dominion could never trace where its oil went down to the individual molecule, New Dominion must do more than merely assert that some of its oil wound up with J. Aron—there must be some measure of proof that it did. By not supplying that proof in the summary judgment record, New Dominion effectively asks the Court to bridge the evidentiary gap by inference. But of course it is J. Aron, not New Dominion, that gets the benefit of the Court's inferences at the summary judgment stage.

New Dominion's rejoinder that J. Aron "cannot prove that [J. Aron] did not buy *all* of [New Dominion's] oil," while probably true, does not advance New Dominion's argument. (ND Reply p. 11) This is New Dominion's Motion, not J. Aron's. The onus is on New Dominion to satisfy the summary judgment standard. Because New Dominion, as the moving party, has not carried its initial burden, J. Aron need not "come forward with specific facts showing that there is a genuine issue for trial." See *U.S. v. Donovan*, 661 F.3d 174, 185 (3d Cir. 2011).

In sum, the Court finds a genuine dispute of fact remains over whether J. Aron ever actually received, or can be deemed to have received, any of New Dominion's oil. That fact must be affirmatively established before the Court can properly address whether the money J. Aron took-in from selling that oil is proceeds subject to New Dominion's liens.

3. It is Premature to Decide Which Party has Superior Rights to the So-called Proceeds

For essentially the same reasons just discussed, the Court finds it cannot grant summary judgment on the third issue New Dominion raises in the Motion: Whether New Dominion's rights to the proceeds held by J. Aron are superior to J. Aron's rights to those proceeds. It would simply be premature for the Court to delve into the parties' claims and defenses to rights in the proceeds, not to mention the constitutional arguments raised by J. Aron, when the parties do not agree that New Dominion's oil ever passed through J. Aron's hands.

III. CONCLUSION

The Court respectfully recommends that the District Court grant the Motion in part, and deny it in part. From this Court's perspective, the undisputed facts establish that New Dominion holds a properly perfected security interest and lien in the oil it sold to SemCrude (and in the proceeds thereof). The Motion should, in this Court's view, be **GRANTED** on that score. The Court further respectfully submits, however, that questions of disputed fact remain as to whether BP holds proceeds from the sale of New Dominion's oil, and if so, which party has superior rights to those proceeds. The Court thus recommends that the Motion be **DENIED** on those issues.

BY THE COURT:

Dated: March 1, 2012
Wilmington, Delaware

Brendan Linehan Shannon
United States Bankruptcy Judge