

CAUSE NO.

XTO ENERGY INC.,

§ IN THE DISTRICT COURT OF

*Plaintiff,*

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ENERGY TRANSFER CRUDE OIL  
COMPANY, LLC, and DAKOTA  
ACCESS, LLC,

IN THE DISTRICT COURT OF

## JUDICIAL DISTRICT

### *Defendants.*

# HARRIS COUNTY, TEXAS

**PLAINTIFF XTO ENERGY INC.'S  
ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF THIS COURT

Plaintiff XTO Energy Inc. ("XTO") files this Original Petition complaining of Defendants Energy Transfer Crude Oil Company, LLC, and Dakota Access, LLC (collectively, "ETCO") and would show the Court as follows:

## **DISCOVERY CONTROL PLAN**

1. Plaintiff intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3. *Copy*

## PARTIES

2. Plaintiff XTO Energy Inc. is a Delaware corporation with its principal place of business located in Harris County, Texas.

3. Defendant Energy Transfer Crude Oil Company, LLC is a Delaware limited liability company with its principal place of business located at 3738 Oak Lawn Avenue, Dallas, Texas 75219. Energy Transfer may be served with citation by serving the citation and a copy of

the petition on its registered agent as follows: Corporation Service Company d/b/a CSC Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 600, Austin, Texas 78701-3218.

4. Defendant Dakota Access, LLC is a Delaware limited liability company with its principal place of business located at 3738 Oak Lawn Avenue, Dallas, Texas 75219. Dakota Access may be served with citation by serving the citation and a copy of the petition on its registered agent as follows: Corporation Service Company d/b/a CSC Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 600, Austin, Texas 78701-3218.

#### **JURISDICTION AND VENUE**

5. The Court has general and specific personal jurisdiction over Defendants, as they have continuous and systematic contacts with the State of Texas and sufficient minimum contacts with the State of Texas, such that the exercise of personal jurisdiction over Defendants is consistent with any constitutional due process rights and traditional notions of fair play and substantial justice. Defendants have engaged in business in Texas and/or the causes of action asserted herein arose from and/or are connected with purposeful acts committed by Defendants in Texas.

6. The amount in controversy exceeds this Court's minimum jurisdictional requirements.

7. Plaintiff expressly pleads that its claims are based on state law and that it has not alleged, nor does it intend to allege, any claims arising under federal law that would invoke federal question jurisdiction under 28 U.S.C. § 1331. There is not complete diversity of the parties, thus precluding removal under 28 U.S.C. § 1441(b)(2).

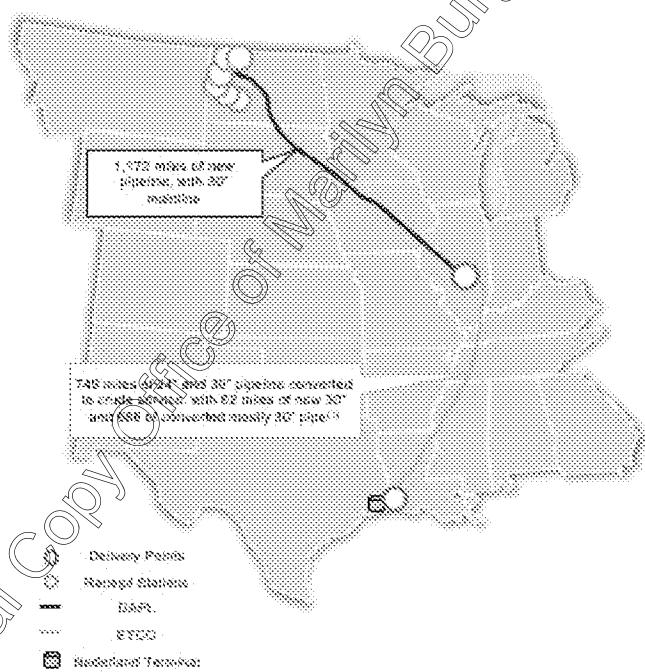
8. Venue is proper in Harris County, Texas, under Chapter 15 of the Texas Civil Practice and Remedies Code because all or a substantial part of the events giving rise to

Plaintiff's claims occurred in Harris County, Texas. Tex. Civ. Prac. & Rem. § 15.002(a).

## FACTS

9. Plaintiff, XTO, produces oil from the Bakken field, an area underlying the surface of parts of Montana and North Dakota.

10. Defendants, ETCO, operate the Dakota Access Pipeline ("DAPL"), a long-haul crude oil pipeline designed to transport Bakken production over 1,000 miles from North Dakota to Illinois. A second stretch of pipeline called the Energy Transfer Crude Oil Pipeline, also operated by Defendants, then carries the production over 700 additional miles from Illinois to Nederland, Texas with deliverability to Gulf Coast crude oil terminals.



11. XTO (as customer) entered a written contract with ETCO (as carrier) whereby XTO would commit to pump certain minimum volumes of crude oil into the DAPL. In the event XTO could not deliver these minimums to the DAPL, XTO would be required to pay ETCO

certain deficiency payments calculated on a per barrel basis for the difference between the number of barrels required to meet the minimums and the number of barrels XTO delivered.

12. As of July 2020, XTO had complied with all obligations under the contract and was ready, willing, and able to continue pumping the required minimum volumes into the DAPL.

13. However, on July 6, 2020, the U.S. District Court for the District of Columbia (Hon. James Boasberg) ordered that the DAPL be shut down for environmental review. Specifically, the Court revoked the pipeline's easement under Lake Oahe and ordered that the pipeline be drained and closed no later than August 5, 2020 – in just one month.

14. In response to the Court's order, ETCO issued public statements that the pipeline was accepting nominations for the month of August and that it would proceed with "business as usual."

15. ETCO also moved, on multiple occasions, for the shutdown order to be stayed – but the Court quickly and summarily denied each of these requests. Nonetheless, ETCO continued to claim it would be business as usual on DAPL.

16. Together, these circumstances – which were entirely outside of XTO's control – gave XTO reasonable grounds to believe ETCO would not be able to perform.

17. This left its customer, XTO, in an impossible situation. A significant volume of XTO's Bakken production was contractually committed to the DAPL – a pipeline that was to be shut down per court order in a month's time. If XTO nominated its full volume for the entire month of August, it would seemingly risk contempt by aiding violation of a court order that the pipeline be shut down by August 5, 2020 – an order that, by then, the Court had refused to stay on multiple occasions. If XTO did nothing, it would risk the dire scenario of perhaps choosing

to shut-in its Bakken production because, with the DAPL unavailable, it would have limited or possibly no alternate means to move its oil away from the production area.

18. All the while, XTO's decisions concerning what to do with its crude oil production were not as easy as flipping a switch – finding alternate means to move production (whether by truck, rail, alternate pipeline, etc.) requires significant lead time, particularly where the available options are limited. Because the shutdown order equally impacted other producers (who, also, would likely be scrambling to lock-in alternatives), alternatives available to XTO would dwindle by the hour.

19. On July 8, 2020, just two days after the Court's ruling, XTO made a good faith written demand (based on its reasonable concerns regarding performance) that ETCO provide assurance that it would be able to take XTO's production volumes on the DAPL.

20. Two days later, on July 10, ETCO's response was equivocal. ETCO stated that while it "believed" the pipeline would not shutdown, it could offer "no guarantee."

21. In the wake of this inadequate assurance (and anticipatory breach), XTO had to reasonably accept the Court's ruling on its face – that transporting its August production volumes on the DAPL would be impossible. As a result, it immediately began lining up other ways to move/deal with the August crude oil production.

22. XTO's agreement with ETCO to pump into the DAPL had always been conditioned on the assumption that the pipeline's operation would not be violative of a court order. Without a timely guarantee from ETCO, XTO had no reasonable option but to suspend performance and mitigate if it could.

23. On the afternoon of July 14, 2020, less than a day before all DAPL nominations for August would otherwise be due, the U.S. Court of Appeals for the District of Columbia Circuit issued a short-term stay of the shutdown order to consider additional briefing.

24. By this time, XTO had already reached the reasonable conclusion that ETCO's performance, as well as its own (*i.e.*, pumping production volumes into the DAPL) would be impracticable. Thus, it had already taken efforts to mitigate in advance of the nomination deadline by finding alternatives for almost 40% of the volume that had originally been committed to DAPL and would have been nominated on July 15, were it not for the shut-down order.

25. With the Court of Appeals suddenly staying execution (without notice) of the District Court's shutdown order, XTO immediately nominated the remaining 60% of its commitment volume (having found no alternatives for that crude oil) to be pumped into the DAPL.

26. It was not until the Court of Appeals issued its stay that XTO had any assurance whatsoever that its August nominations would not be contrary to a court order or that any amounts of its August production volumes could flow on the DAPL. Nor could XTO reasonably wait until less than twenty-four hours before the nomination deadline – when the Court of Appeals ruling was issued – to begin solidifying alternatives due to the inherent lead time required.

27. Rather than accepting that the Court's order and ETCO's own words (or lack thereof) had placed XTO in an impossible situation, ETCO cited XTO's ship or pay commitment and proclaimed a shortfall for the month of August – arguing that XTO only delivered roughly 60% of the minimum monthly volume contemplated by the parties' agreement.

28. XTO specifically advised ETCO that it was excused from pumping the full minimum volumes due to the exigent circumstances.

29. Shortly after that, during August 2020, with Hurricane Laura brewing in the Gulf of Mexico, the ExxonMobil Beaumont refinery (along with other potential destination points in the area for the DAPL crude) was forced to shut down due to the storm. The ExxonMobil Beaumont refinery is a destination point that processes a significant volume of crude oil transported from the Bakken field on the DAPL.

30. The ExxonMobil Beaumont refinery began the shutdown process on August 24 and a *mandatory* evacuation order followed a day later from Jefferson County for all non-essential facility personnel. No alternate facility was available to take the volumes that would otherwise be received at the Beaumont facility.

31. On August 27, Hurricane Laura, a Category 4 storm with winds of approximately 150 mph, made landfall to the east of Beaumont in nearby Cameron, Louisiana. Through a variety of public statements, ETCO remarked on the significant operational changes and precautions it had to take as a result of the storm.

32. On September 17, XTO timely issued a notice of customer force majeure (as described under the parties' written agreement) for the four days the ExxonMobil Beaumont refining facility was offline due to the storm.

33. Again, these were circumstances entirely outside of XTO's control.

34. Nonetheless, on November 23, ETCO denied XTO's claim of force majeure.

35. Ultimately, despite the circumstances caused by the Court's shutdown order, ETCO's own failure to provide adequate assurance, the impracticability of XTO and ETCO's performance, and an inability to flow additional volumes due to a major hurricane, ETCO

charged XTO with significant deficiency payments for the month of August 2020. In addition, ETCO drew down on XTO's production volume credits, only furthering the financial harm XTO suffered.

36. XTO made the August 2020 deficiency payments in response to ETCO's demand, but did so under objection, protest, and with a full reservation of rights to now make these claims.

37. XTO has since demanded a full refund, but to no avail. XTO now is forced to file suit to recover the deficiency payments ETCO improperly charged and retrieve the production volume credits ETCO improperly applied.

## **CAUSES OF ACTION**

### **I. Breach of Contract (Against Defendants Energy Transfer and Dakota Access)**

38. Plaintiff incorporates by reference all allegations in this Petition as if in full.

39. A valid, enforceable written contract existed between Plaintiff and Defendants.

40. XTO fully performed and/or was excused from performing its part of the agreement, but Defendants breached their obligations – namely, by improperly charging XTO deficiency payments for August 2020 and improperly applying production volume credits.

41. At all relevant times, Defendants had an obligation to provide adequate assurance in response to XTO's reasonable request, honor extraordinary operating conditions (as set forth in the agreement) and honor a valid claim of force majeure (as set forth in the agreement). They failed to do so. In addition, based on the factual circumstances, Defendants' demand for performance (payment of the August 2020 deficiency payments) was invalid because there was never a valid requirement that XTO pump the August 2020 minimum volumes. This was due to

a supervening court order, applicable legal requirements, resulting impracticability, anticipatory breach, ETCO's inability to provide services, and a material change in law and circumstance.

42. XTO has been damaged by Defendants' breaches and seeks damages within the jurisdictional limits of the Court, reinstatement of production volume credits, pre- and post-judgment interest, costs, and attorneys' fees.

## **II. Money Had and Received (Against Defendants Energy Transfer and Dakota Access)**

43. Plaintiff incorporates by reference all allegations in this Petition as if in full.

44. Defendants hold money that belongs to Plaintiff in equity and good conscience.

45. Defendants hold this money due to overpayments made by XTO.

46. XTO's money includes not only the dollars paid in the form of the August 2020 deficiency payments, but also in the form of production volume credits (functioning as a money equivalent or as an offset to money payments).

47. XTO has been damaged by Defendants' conduct and seeks damages within the jurisdictional limits of the Court, pre- and post-judgment interest, costs, and attorneys' fees.

## **MISCELLANEOUS**

48. Plaintiff requests trial by jury and will pay the requested fee.

49. Pursuant to Rule 47(c) of the Texas Rules of Civil Procedure, Plaintiff seeks monetary relief over \$1,000,000.

50. All conditions precedent to Plaintiff's claims for relief have been performed, have occurred, have been waived, or have otherwise been excused from performance.

## **PRAYER**

51. Plaintiff XTO requests that it be awarded relief as follows:

a. Damages equivalent to the loss suffered by XTO;

- b. Reinstatement of XTO's production volume credits;
- c. Pre- and post-judgment interest;
- d. Attorneys' fees and costs; and
- e. Such other and further relief to which it may be justly entitled.

Dated: March 29, 2021

Respectfully submitted,

SCHIFFER HICKS JOHNSON, PLLC

/s/ Andrew S. Hicks

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