

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:	§	CHAPTER 11
	§	
EXPRESS ENERGY SERVICES OPERATING, LP, et al.,	§	CASE NO. 09-38044
	§	
DEBTORS.	§	JOINTLY ADMINISTERED

LIMITED OBJECTION TO CONFIRMATION OF DEBTORS' CHAPTER 11 PLAN

Darrell Brewer ("Brewer"), a creditor, equity holder, and party in interest herein, files this Limited Objection to Confirmation of Debtors' Chapter 11 Plan, and in support thereof would show the Court the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. The Objection is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. § 1409.

RELEVANT BACKGROUND

2. On October 27, 2009 (the "Petition Date"), Express Energy Services Operating, LP, Express Energy Services (2008) LLC (the "Debtors"), and numerous other affiliated entities, filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

3. Prior to the Petition Date, on August 21, 2008, Brewer filed an Original Petition styled *Darrell Brewer v. Express Energy Services Operating, LP and Express Energy Services (2008) LLC* (Cause No. 20090-53824) in the District Court of Harris County, Texas (125th Judicial District) (the "State Court Litigation or the "Brewer Lawsuit"). Brewer initiated the

State Court Litigation seeking a declaratory judgment that pursuant to certain agreements between Brewer and the Debtors, Brewer is free to engage in competition with the Debtors once the control of the Debtors changes hands. On September 21, 2009, the Debtors filed their Original Answer and Counterclaim (the "Answer and Counterclaim") denying every allegation made by Brewer in the State Court Litigation.

4. On October 27, 2009, the Debtors filed their Proposed Disclosure Statement [Dkt. No. 18] (the "Disclosure Statement") and their Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code [Dkt. No. 17] (the "Plan").

5. On November 5, 2009, the Debtors filed a notice of removal in this Court, pursuant to which they removed the State Court Litigation to this Court as Adversary Proceeding No. 09-03445 (the "Adversary Proceeding").

OBJECTION

6. Brewer and his affiliated companies (collectively, the "Brewer Parties") are parties to various agreements with the Debtors, including the following agreements defined in the Plan: (i) Escrow Agreement¹; (ii) Consulting Agreement; and (iii) Transaction Agreement (collectively, the "Brewer Agreements"). Although not yet clear, it appears that the Brewer Agreements are being assumed under the Plan.² Pursuant to § 11.8 of the Plan, the Debtors are clearly reserving their rights under these agreements, as well as their rights with respect to Brewer, the Indemnity Escrow Account, the Brewer Lawsuit, and the Answer and Counterclaim.

7. Brewer objects to the Plan to the extent the Debtors are attempting to assume the benefits under these contracts without assuming the concomitant obligations. *See Ins. Co. of N.*

¹ Capitalized terms not defined herein shall have the definition given to them in the Plan.

² To the extent the Debtors intend to reject any of these agreements, Brewer objects to § 11.8 of the Plan to the extent the Debtors are attempting to reserve their rights under these agreements.

America v. NGC Settlement Trust (In re Century Indemnity Co.), 208 F.3d 498, 506 (5th Cir. 2000) (when the debtor assumes an executory contract, it assumes both the benefits *and the obligations* of the contract). The Brewer Agreements are executory contracts and must therefore be assumed in total or not at all. *See Stewart Title Guaranty Co. v. Old Republic Nat'l Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (an executory contract must be assumed or rejected in its entirety). Brewer requests that the following language be added to the Plan to ensure that Brewer's rights are protected with respect to the Brewer Agreements and the Brewer Lawsuit:

Nothing in the Plan or Confirmation Order shall discharge, release, enjoin or stay any claims, rights, causes of action or defenses Brewer or any entity associated or affiliated with Brewer (collectively with Brewer, the "Brewer Parties") may have arising under or related to the Escrow Agreement, the Indemnity Escrow Account, the Brewer Lawsuit, the Answer and Counterclaim, the Consulting Agreement, the Transaction Agreement or any contract or lease assumed under the Plan, and the Brewer Parties may assert any such claims, rights, causes of action and defenses against the Reorganized Debtors.

8. The Reorganized Debtors cannot preserve their rights under the foregoing agreements and at the same time provide that the counterparties to these agreements have no rights to enforce these same agreements against the Reorganized Debtors. Therefore, the proposed language above is intended to mirror the rights being preserved by the Debtors under § 11.8 of the Plan and ensure that the Debtors accept the obligations of their assumed executory contracts.

PRAYER

For the foregoing reasons, Brewer respectfully requests that the Court require the Debtors to add the foregoing proposed language to the Plan, or, alternatively, deny confirmation of the Plan and grant Brewer such other and further relief as is just and proper.

Dated: December 1, 2009

Respectfully submitted,

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**ATTORNEYS FOR
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been served on the parties listed in the attached Service List via electronic means as listed on the court's ECF noticing system or by regular U. S. First Class Mail on this 1st day of December, 2009.

By: /s/ William A. (Trey) Wood, III
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