

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

In re	§	
	§	Chapter 11
	§	
EXPRESS ENERGY SERVICES	§	
OPERATING, LP, <i>et al.</i> ,	§	Case No. 09-38044
	§	
Debtors.	§	
	§	Jointly Administered

**EXPRESS ENERGY’S RESPONSE TO THE OBJECTION OF JACK WINN TO THE THIRD REVISED EXHIBIT 5 OF THE PLAN SUPPLEMENT [DOCKET NO. 212]**

TO THE HONORABLE JEFF BOHM  
UNITED STATES BANKRUPTCY JUDGE:

Express Energy Services Operating, LP (“**Express Energy**”), a reorganized debtor,<sup>1</sup> files this response to the objection of Jack Winn (“**Winn**”) to the Third Revised Exhibit 5 of the Plan Supplement, dated December 31, 2009 (the “**Objection**”) [Docket No. 214], and respectfully represents as follows:

**BACKGROUND**

**A. The Winn Employment Agreement and the Change of Control Bonus**

1. Winn is currently employed as the President of the Reorganized Debtors’ Plug and Abandonment Division (the “**P&A Division**”). Prior to the Commencement Date, Express Energy and Winn entered into that certain Employment Agreement, dated June 21, 2007 (the “**Winn Employment Agreement**”). The Winn Employment Agreement provides, among other things, that Winn is entitled to receive a base salary for his services in the P&A Division

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<sup>1</sup> On October 27, 2009 (the “**Commencement Date**”), the debtors in the above-captioned chapter 11 cases (the “**Debtors**”) each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Southern District of Texas (the “**Bankruptcy Court**”). On December 7, 2009, the Bankruptcy Court entered an order (the “**Confirmation Order**”) [Docket No. 189] confirming the Debtors’ Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the “**Plan**”), and on December 31, 2009, the Plan became effective in accordance with its terms.

and the following bonus payments: (1) a signing bonus of \$150,000, (2) a one year employment anniversary bonus of \$150,000, (3) a year two employment anniversary bonus, and each subsequent employment anniversary year bonus, of up to \$150,000 upon meeting a certain established annual sales revenue figure, and (4) a bonus of \$500,000 (a “**Change of Control Bonus**”) upon the company’s change of control, defined in the Winn Employment Agreement as “at least 51% of the company stock is **sold** to a non-current owner” (emphasis added).

2. The Debtors paid Winn the Change of Control Bonus prior to the Commencement Date. As more fully described in the *Declaration of Darron Anderson in Support of the Debtors’ Chapter 11 Petitions and First Day Motions*, dated October 27, 2009 [Docket No. 2], prior to the Commencement Date, Express Energy Services (2008) LLC (“**EES 2008**”) purchased (the “**Acquisition**”) the equity interests in, *inter alia*, Express Energy Services Holding, LP, pursuant to that certain Transaction Agreement, dated as of June 8, 2008, as amended by the amendments thereto dated as of July 8, 2008 and November 18, 2008 (the “**Transaction Agreement**”). Winn was paid \$469,000 on or about July 11, 2008, which consists of the \$500,000 Change of Control Bonus less the required employment tax withholdings.

**B. The Plan Supplement**

3. Prior to entry of the Confirmation Order, Winn informed certain members of the Debtors’ senior management of his belief that the restructuring transactions to be effected pursuant to the Plan entitled Winn to receive an additional \$500,000 Change of Control Bonus payment under the Winn Employment Agreement. On December 2, 2009, the Debtors filed their Plan Supplement in Support of the Plan (the “**Plan Supplement**”) [Docket No. 172]. Exhibit 5 to the Plan Supplement lists the executory contracts and unexpired leases the Debtors sought to

reject in accordance with the Plan and includes a separate page with four explanatory notes relating to Exhibit 5 (collectively, the “**Notes**”).

4. Note 3 to Exhibit 5 states that the Debtors are parties to eight employment agreements that include change of control provisions and that the Debtors had satisfied and paid all obligations arising under these change of control provisions prior to the Commencement Date. Note 3 further provides, out of an abundance of caution, that to the extent the change of control provision remained executory, that the Debtors would be rejecting the agreements as of the effective date of the Plan (the “**Effective Date**”). The Winn Employment Agreement is one of the agreements referenced in Note 3. None of the other individuals have raised any issue of objection relating to the Change of Control Bonus.

5. On or about December 9, 2009, the Debtors’ CEO, Darron Anderson spoke telephonically with Winn regarding the Change of Control Bonus and sent Winn, via certified mail, a letter reiterating the Debtors’ position that (i) all amounts relating to the Change of Control Bonus had been satisfied prior to the Commencement Date and (ii) the Debtors intended to reject the Winn Employment Agreement as of the Effective Date to the extent any amounts relating to the Change of Control Bonus would be due and owing to Winn.

6. The Debtors subsequently filed a Revised Exhibit 5 of the Plan Supplement [Docket No. 177], a Second Revised Exhibit 5 of the Plan Supplement [Docket No. 184], and a Third Revised Exhibit 5 of the Plan Supplement [Docket No. 212], each which revised the list of executory contracts and unexpired leases in Exhibit 5. None of these revised Exhibits, however, amended the language to the Notes to Exhibit 5 of the Plan Supplement.

**C. Winn's Objection to the Third Revised Exhibit 5 of the Plan Supplement and Claim for a New Change of Control Bonus Payment**

7. Under the Plan, Winn's equity interests in EES 2008 were classified under Class 5 (Existing Equity Interests). On the Effective Date, all Existing Equity Interests, including Winn's Existing Equity Interests, were cancelled; all equity interest holders, including Winn, received no distribution on account of such Existing Equity Interests.<sup>2</sup> In addition, pursuant to the Plan, the outstanding Senior Secured Claims (as defined in the Plan) held by the Debtors' prepetition secured lenders were satisfied through the issuance of New Equity Units (as defined in the Plan).<sup>3</sup> Despite the cancellation of his Existing Equity Interests under the Plan, Winn asserts that the Plan effected a sale of the Debtors' stock that triggered an additional \$500,000 Change of Control Bonus payment under the Winn Employment Agreement.

8. Pursuant to the Objection, Winn objects to the Debtors' alleged partial rejection of his employment agreement and asserts that Express Energy "seeks to avoid payment" of funds allegedly owed to Winn." *Objection*, ¶ 14. The Debtors submit that such an objection is unfounded and is a gross misstatement of Winn's rights under the Winn Employment Agreement. The real dispute between the parties is whether Winn is entitled to a new Change of Control Bonus payment under the Winn Employment Agreement. Express Energy submits that Winn is not entitled to a new Change of Control Bonus payment because (i) the Debtors already paid Winn the only Change of Control Bonus payment owed to Winn pursuant to the Transaction Agreement; (ii) even if Winn could be entitled to another Change of Control Bonus, a "change of control" (as defined in the Winn Employment Agreement) has not

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<sup>2</sup> See Plan, at Section 4.5- Existing Equity Interests (Class 5); Section 5.2(a)- Restructuring Transactions; Section 5.3- Cancellation of Existing Agreements and Existing Equity Interests; and Section 11.3- Discharge of Claims and Termination of Existing Equity Interests.

<sup>3</sup> See Plan, at Section 4.3-Senior Secured Claims (Class 3) and Section 5.2(a)-Restructuring Transactions.

occurred since the payment of the original Change of Control Bonus; and (iii) any payment of a Change of Control Bonus would violate section 503(c)(1) of the Bankruptcy Code because Winn was an “insider” of the Debtors.

**RESPONSE**

**A. Winn is Not Entitled to Another Change of Control Bonus Under the Winn Employment Agreement**

*i. Express Energy Already Paid The Change of Control Bonus*

9. Winn asserts that Express Energy is obligated to pay Winn \$500,000 upon the occurrence of any change of control and Express Energy “seeks to avoid payment” of funds allegedly owed to Winn.” *Objection*, ¶ 14. As stated earlier, in connection with the Acquisition, on or about July 11, 2008 Express Energy paid Winn the Change of Control Bonus because a sale occurred pursuant to the Transaction Agreement. There is no language in the Winn Employment Agreement affording Winn a right to receive serial Change of Control Bonus payments. Therefore, the Debtors submit that they have satisfied all outstanding amounts relating to the Change of Control Bonus provision under the Winn Employment Agreement.<sup>4</sup> The other seven employees of Express Energy who have change of control provisions in their employment agreements have accepted that no further change of control payments are due.

*ii. The Restructuring Transactions Effected Pursuant to the Plan Did Not Entitle Winn to an Additional Change of Control Bonus Payment*

10. Even if the Winn Employment Agreement does not specifically limit Winn’s right to receive a Change of Control Bonus to a singular occurrence, Winn is still not entitled to an additional Change of Control Bonus because another “change of control” (as defined in the Winn Employment Agreement) has not occurred since the Acquisition. The Winn

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<sup>4</sup> Express Energy has also satisfied all other bonus and base salary payments owed to Winn under the Winn Employment Agreement.

Employment Agreement defines a change of control as “*at least 51% of the company stock is sold to a non-current owner*” (emphasis added). Winn now implicitly alleges that the restructuring transactions effected pursuant to the Plan gave rise to a “change of control.”

11. Contrary to the assertions made by Winn that a sale occurred under the Plan, in fact, the Plan provided for the *cancellation* (emphasis added) of the Debtors’ Existing Equity Interests and issuance of New Equity Units to satisfy the prepetition Secured Senior Claims.<sup>5</sup> This is a classic court-supervised debt-for-equity swap which is akin to a foreclosure by the secured creditor and not a third party sale where equity receives the consideration. Furthermore, the economic realities are that the equity was wiped out and the secured creditors recovered between 24-33 cents on the dollar. In these circumstances it would be highly inequitable for the President of one of the divisions to receive another Change of Control Bonus less than 18 months after receiving the first one.

12. Accordingly, Winn’s argument that Express Energy is attempting to avoid a Change of Control Bonus payment to Winn has no merit and the Bankruptcy Court should find that Winn is not entitled to a Change of Control Bonus payment under the Winn Employment Agreement.

**B. Any Change of Control Payment Would Violate § 503(c)(1) of the Bankruptcy Code**

13. Assuming, *arguendo*, that a “change of control” (as defined in the Winn Employment Agreement) did occur subsequent to the Commencement Date, any payment of a Change of Control Bonus during the Debtors’ chapter 11 cases would have violated section 503(c)(1) of the Bankruptcy Code because Winn is an “insider.”

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<sup>5</sup> See Plan, at Section 4.3-Senior Secured Claims (Class 3); Section 4.5- Existing Equity Interests (Class 5); Section 5.2(a)- Restructuring Transactions; Section 5.3- Cancellation of Existing Agreements and Existing Equity Interests; and Section 11.3- Discharge of Claims and Termination of Existing Equity Interests.

14. Section 503(c) of the Bankruptcy Code provides, in relevant part, that there shall neither be allowed, nor paid:

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business . . .

11 U.S.C. § 503(c)(1). Section 101(31)(C)(v) of the Bankruptcy Code defines “insider” to include, among other persons, a “person in control of the debtor.” 11 U.S.C. § 101(31)(C)(v). Winn, as the President of the P&A Division, was an insider of the Debtors. Winn states in the Objection that he would have never entered into the Winn Employment Agreement without the inclusion of all the provisions negotiated by Winn and Express Energy. *Objection*, ¶ 14.

According to Winn's statements, a Change of Control Bonus payment would be considered a retention payment to induce Winn to remain with Express Energy because it is not based on the satisfaction of any performance or work-related goals. Payment of such a retention-based bonus like a Change of Control Bonus to Winn would not be justified under any of the subsections of section 503(c)(1) of the Bankruptcy Code. Accordingly, Express Energy submits that Winn is not entitled to a Change of Control Bonus and, even if he was, any payment thereof would not have been allowed pursuant to the Bankruptcy Code.

15. To the extent, however, that Winn is entitled to receive a Change of Control Bonus pursuant to the Winn Employment Agreement, the Winn Employment Agreement should be deemed rejected as of the Effective Date and Express Energy reserves all rights in connection therewith.<sup>6</sup>

16. Express Energy respectfully submits that Winn has not been disadvantaged vis-à-vis other holders of Existing Equity Interests, nor vis-à-vis the other seven

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<sup>6</sup> As of the date of this response, a hearing date has not been scheduled to consider the Objection. Express Energy reserves its right to supplement this response at any time prior to a hearing to consider the Objection.

Express Energy employees who had change of control provisions in their employment agreements.

WHEREFORE, Express Energy respectfully requests, to the extent necessary, that the Bankruptcy Court enter an order providing that (i) Winn is not entitled to receive a new Change of Control Bonus payment under the Winn Employment Agreement or (ii) to the extent Winn is entitled to receive a new Change of Control Bonus payment under the Winn Employment Agreement, that the Winn Employment Agreement was rejected as of the Effective Date in accordance with the Plan.

Dated: January 21, 2010  
Houston, Texas

/s/ Alfredo R. Pérez  
Alfredo R. Pérez (15776275)

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