SO ORDERED,

Judge Edward Ellington
United States Bankruptcy Judge
Date Signed: September 18, 2014

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 11**
O & G LEASING, LLC, ET AL. **CASE NO. 1001851EE**
Jointly Administered

O & G LEASING, LLC AND PERFORMANCE DRILLING CO., LLC.

VS. **ADVERSARY NO. 1200086EE**

CANYON DRILLING COMPANY

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Edward Ellington, Judge

PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW ON
THE *VERIFIED COMPLAINT FOR TEMPORARY AND*
AND PERMANENT INJUNCTIVE RELIEF AND FOR OTHER RELIEF

THIS MATTER came before the Court on the *Verified Complaint for Temporary and Permanent Injunctive Relief and for Other Relief* (Adv. Dkt. #1) filed by O & G Leasing, LLC, and *Canyon Drilling Company's Response to Verified Complaint for Temporary and Permanent Injunctive Relief and for Other Relief* (Adv. Dkt. #23). Having considered same, the evidence presented at trial, and the respective briefs filed by the parties, the Court finds that the request for damages contained in the *Verified Complaint for Temporary and Permanent Injunctive Relief and for Other Relief* (Adv. Dkt. #1) filed by O & G Leasing, LLC, is well taken and should be granted in part and denied in part.

PROPOSED FINDINGS OF FACT[1]

O & G Leasing, LLC (O&G) and Performance Drilling Company, LLC (PDC) were created in 2006 for the purpose of owning and operating oil and gas drilling rigs. O&G owns the drilling rigs and leases them to PDC, its operating subsidiary. Once PDC obtains drilling contracts with exploration companies, PDC provides the drilling rigs and the crews to drill for oil and gas.[2]

On May 21, 2010, O&G and PDC filed separate petitions for relief under Chapter 11 of the

[1]These proposed findings of fact and conclusions of law constitute the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. To the extent any of the following findings of fact are determined to be conclusions of law, they are adopted, and shall be construed and deemed, conclusions of law. To the extent any of the following conclusions of law are determined to be findings of fact, they are adopted, and shall be construed and deemed, as findings of fact.

[2]For a more detailed description of the business operations of O&G and PDC, see *Motion for Order Directing Joint Administration of Affiliated Cases Pursuant to Rule 1015(b),* Case No. 10-01851EE, Docket No. 14, May 24, 2010.

United States Bankruptcy Code. On May 27, 2010, the Court entered an *Order Directing Joint Administration of Affiliated Cases Pursuant to Rule 1015(b)* (Dkt. #34) which consolidated the cases into the main bankruptcy case of O&G (Case No. 10-01851EE). For purposes of these proposed findings, the Court will refer to O&G and PDC collectively as the Debtor.

Once the bankruptcy case was filed, one of the Debtor's creditors, First Security Bank (FSB) proposed a plan to market and sell the assets of the Debtor. FSB hired Sterne, Agee & Leach, Inc. (Sterne Agee) to market and sell the assets of the Debtor. In conjunction with the sale of the Debtor's assets, FSB filed a *Motion of First Security Bank, as Indenture Trustee, for an Order (A) Establishing Sales Procedures in Connection with Solicitation of Offers for Sale of Certain Assets; (B) Approving Stalking Horse Bid Protection; and (C) Setting Notice of Objection Deadlines and Dates of Hearings* (Dkt. #441) on August 5, 2011. Since the Debtor strongly opposed FSB's attempts to market and sell its assets, a long, contentious battle between the Debtor and FSB began. The Debtor was very concerned with the sales process disrupting its business, and the Debtor was especially concerned with providing confidential information about its customers, its employees, and its finances.

On October 12, 2011, the Court entered an *Order Granting Motion of First Security Bank, as Indenture Trustee, for an Order (A) Establishing Sales Procedures in Connection with Solicitation of Offers for Sale of Certain Assets; (B) Approving Stalking Horse Bid Protection; and (C) Setting Notice of Objection Deadlines and Dates of Hearings* (Dkt. #563).

As a result of the Debtor's concerns about protecting its proprietary information, the Debtor and FSA eventually entered into *Order on Motion of First Security Bank, as Indenture Trustee, to Preserve Status of Interested Parties as Potential Bidders and to Approve Form of Confidentiality*

Agreement (Dkt. #677). Before potential buyers could obtain proprietary and confidential information about the Debtor's drilling operations, potential buyers were required to sign the *Non-Disclosure and Confidentiality Agreement* (CA). (Trial Exhibit 1).[3]

Canyon Drilling Company (Canyon) submitted a letter to Sterne Agee expressing its *bona fide* interest in purchasing the Debtor's assets. (Trial Exhibit 3B). As a result, Sterne Agee delivered a CA to Canyon. On January 17, 2012, the President of Canyon, Gary Holley (Holley), delivered an executed CA to Sterne Agee.[4]

In very general terms, the CA required the signor to agree to keep all information about the Debtor confidential; agree not to initiate contact with any of the Debtor's suppliers or customers; and agree not to solicit or hire any of the Debtor's employees. The CA further provided that any party who violated the terms of the CA was subject to "damages, losses, costs and expense, including without limitation, reasonable attorneys' fees arising from any breach of this Agreement."[5]

On August 6, 2012, the Debtor filed its *Verified Complaint for Temporary and Permanent Injunctive Relief and for Other Relief* (Adv. Dkt. #1) (Complaint). In its Complaint, the Debtor alleges that during the month of July 2012, Canyon solicited and hired its employees, in direct violation of the CA. In addition, the Debtor alleges that Canyon communicated with its customers

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[3]The exhibits introduced at trial were submitted to the Court in a three-ring binder. The binder had numbered divider tabs, and these are the numbers assigned to the trial exhibits. However, some of the documents were used as exhibits during depositions. These documents have numbered exhibit stickers on the first page of the exhibit. These numbers are different from the exhibit number assigned to the document at the trial. For the purposes of these findings, any reference to an exhibit number is the number the exhibit was assigned at the trial.

[4]*Verified Complaint for Temporary and Permanent Injunctive Relief and for Other Relief*, Adv. Proc. No. 1200086EE, Adv. Dkt. #1, Exhibit B, *Non-Disclosure and Confidentiality Agreement*, August 6, 2012.

[5]*Id.* at ¶ 9, p. 4.

in an effort to lure their business to Canyon.[6] The Debtor sought a temporary restraining order (TRO) and a permanent restraining order against Canyon. In addition, the Debtor requested damages for breach of contract and sanctions against Canyon.

On August 6, 2012, the Court held an emergency hearing on the Debtor's request for a temporary restraining order against Canyon. The Court signed a *Temporary Restraining Order* (Adv. Dkt. #3) (TRO) on August 6, 2012. In the TRO, Canyon was enjoined from having any contact with the Debtor's employees, customers and going to any site where the Debtor was operating or maintained an office. By agreement, the TRO was extended numerous times.

On November 9, 2012, *Canyon Drilling Company's Response to Verified Complaint for Temporary and Permanent Injunctive Relief and for Other Relief* (Adv. Dkt. #23) (Answer) was filed. In its Answer, Canyon admits that it hired some of the Debtor's employees, but states that the employees approached Canyon and, therefore, that it did not violate the CA.

On November 13, 2012, the Court entered a *Scheduling Order* (Adv. Dkt. #24). By agreement, the parties extended the *Scheduling Order* three times. After the *Scheduling Order* had run, the Complaint and Answer were set for a pre-trial conference on January 21, 2014, and the trial was set for January 30, 2014.

At the conclusion of the trial, the parties requested a transcript. On February 19, 2014, the official transcript (Adv. Dkt. #63) was filed with the Court. On February 21, 2014, the parties submitted an *Order Establishing Post-Trial Briefing Deadline* (Adv. Dkt. #64). Both briefs were

[6]The details of the Debtor's allegations will be discussed later in these proposed findings.

filed on March 24, 2014. The Court thereafter took the matter under advisement.[7]

PROPOSED CONCLUSIONS OF LAW

I. Jurisdiction

Under 28 U.S.C. § 1334(b), the Court's jurisdiction extends to "all civil proceedings arising under title 11, or arising in or related to cases under title 11."[8] "'Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 ... and may enter appropriate orders and judgments [in such core proceedings].' 28 U.S.C. § 157(b)(1)." *In re Spillman Dev. Grp., Ltd.,* 710 F.3d 299, 305 (5th Cir. 2013).

"As for 'non-core' proceedings, 28 U.S.C. § 157(c) authorizes a bankruptcy court either to 'submit proposed findings of fact and conclusions of law to the district court,' which are reviewed *de novo,* or to enter final judgment with the parties' consent. *Executive Benefits,* 134 S. Ct. at 2172." *Galaz v. Galaz (In re Galaz),* No. 13-50781 Cons. w/No. 13-50783, 2014 WL 4197213, at *3 (5th Cir. Aug. 25, 2014).

The Court of Appeals for the Fifth Circuit very recently addressed the issue of a bankruptcy court's *related to* jurisdiction in *Galaz.* In discussing a bankruptcy court's *related to* jurisdiction, the Fifth Circuit held:

> Relevant to the analysis here are those cases that are at least "related to" a bankruptcy case.

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[7]At the time the Court took the matter under advisement, *Executive Benefits Ins. Agency v. Arkison* was pending before the United States Supreme Court. For the reasons discussed in the *Jurisdiction* section of these proposed findings, on May 29, 2014, the Court informed the parties that before it considered the matter at bar, it would wait until the United States Supreme Court had issued its opinion in *Executive Benefits*. The Supreme Court issued its opinion on June 9, 2104. *Executive Benefits Ins. Agency v. Arkison,* — U.S. —, 134 S. Ct. 2065 (June 9, 2014).

[8]28 U.S.C. § 1334(b).

> Although the Bankruptcy Code does not define "related matters,"... we determined that a matter is related for § 1334 purposes when "'the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy.'" As we later more specifically stated, "'[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.'" Conversely, "bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor."
>
> [*Walker,* 51 F.3d] at 569 (internal citations omitted) (emphasis in original).

Galaz, 2014 WL 4197213, at *2.

The Fifth Circuit further stated that

> [w]hile Section 157 gives bankruptcy courts statutory authority to enter final judgment on specific bankruptcy-related claims, "Article III of the Constitution prohibits bankruptcy courts from finally adjudicating certain of those claims." *Id*. at 2168. "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern* [*v. Marshall,* 131 S. Ct. 2594] at 2618. Thus, "when a debtor pleads an action arising only under state-law, . . . or when the debtor pleads an action that would augment the bankrupt estate, but not 'necessarily be resolved in the claims allowance process[,]' then the bankruptcy court is constitutionally prohibited from entering final judgment." *Waldman,* 698 F.3d at 919 (quoting *Sterns,* [*sic*] 131 S. Ct. at 2618). *Accord In re BP RE,* 735 F.3d at 285.

Id. at *3.

In the case at bar, there is some question as to whether this Court has *related to* jurisdiction: the Debtor's claim is based on state law and this action is not a matter that would be resolved through the claims allowance process. And even though the parties were in agreement for this Court to rule on the adversary proceeding, in light of the United States Supreme Court declining to address the issue of whether *The Constitution of the United States of America* permits a bankruptcy court

to adjudicate non-core matters with the consent of the parties,[9] this Court must exercise caution in determining whether it has the constitutional authority to decide this matter. Consequently, the Court will submit its proposed findings of fact and conclusions of law to the United States District Court for the Southern District of Mississippi. The district court may "review the claim *de novo* and enter judgment. This approach accords with the bankruptcy statute and does not implicate the constitutional defect identified by *Stern.*" *Executive Benefits,* 134 S. Ct. at 2170.

II. Breach of Contract

A. Elements

As noted above, the Debtor is seeking damages against Canyon for violation of the CA. The pertinent sections of the CA are as follows:

> **2. Restricted Use of Confidential Information.** Recipient will not, without the prior written consent of Disclosing Party (which consent shall not be unreasonably withheld): (a) ***use any portion of the Confidential Information for any purpose other than evaluating the Proposed Sale;*** . . . (d) initiate contacts with respect to the Proposed Sale with the customers or suppliers of Disclosing Party identified in the Confidential Information or with any employee of Disclosing Party (other than in accordance with this Agreement).
>
> . . . .
>
> The Recipient shall not use any of the Disclosing Party's Confidential Information in any manner that would constitute a violation of any laws or regulations. Except where Recipient is the Approved Purchaser, Recipient shall not directly or indirectly induce, seek to induce, solicit, or hire any of Disclosing Party's employees, or any person employed by Disclosing Party during the six (6) month period ending on the date of the last exchange of Confidential Information to Recipient hereunder, for a period one year after the last exchange of Confidential Information to Recipient hereunder; provided that Recipient shall not be prevented from employing any employee of Disclosing Party who: (i) contacts Recipient on his or her own initiative without any direct or indirect solicitation or encouragement by Recipient; or (ii) contacts Recipient in response to a general advertisement or solicitation in the media

[9] *Executive Benefits,* — U.S. —, 134 S. Ct. at 2175.

which is not targeted at such employee.

. . . .

> **9. Damages, Specific Performance.** Recipient understands and acknowledges that any disclosure or misappropriation of any of the Confidential Information in violation of this Agreement may cause Disclosing Party irreparable harm, the amount of which may be difficult to ascertain, and therefore Recipient agrees that Disclosing Party shall have the right to apply to the United States Bankruptcy Court for the Southern District of Mississippi for specific performance and/or an order restraining and enjoining any such further disclosure or breach and for such other relief as Disclosing Party shall deem appropriate. Such right of Disclosing Party is to be in addition to the remedies otherwise available to Disclosing Party at law or in equity. Recipient expressly waives the defense that a remedy in damages will be adequate and any requirement in an action for specific performance or injunction for the posting of a bond by Disclosing Party. Recipient shall indemnify and hold the Disclosing Party harmless from any damages, losses, costs and expense, including, without limitation, reasonable attorneys' fees arising from any breach of this Agreement. In the event the Recipient prevails in any such litigation instituted by Disclosing Party related to this Agreement, Disclosing Party shall pay the reasonable attorneys' fees incurred by Recipient for defending such litigation.[10]

The Court notes that other than citing the above sections of the CA, the Debtor has not cited authority to support its position that it is entitled to an award of damages and attorney fees nor has the Debtor cited any authority which would give the Court guidance on the elements of a breach of contract claim.

On the other hand, Canyon does cite to cases which list the elements a party must prove in order to recover on a breach of contract claim. Canyon also cites cases which discuss the damages a party is entitled to receive when there has been a breach of a contract.

The Supreme Court of Mississippi has held that in order to prove a claim for a breach of a contract, the moving party "has the burden to prove, 'by a preponderance of the evidence: 1. the

[10]Trial Exhibit 1, *Non-Disclosure and Confidentiality Agreement*, pp. 2-4.

existence of a valid and binding contract; and 2. that the defendant has broken, or breached it[.]'"[11] Further, if monetary damages are sought as a remedy for breach of a contract, the party "seeking monetary damages for breach of contract must put into evidence, with 'as much accuracy as' possible, proof of the damages being sought."[12] Finally, damages "must be proven to a reasonable certainty and must not place the injured party in a better position than they otherwise would have been in." *Polk v. Sexton*, 613 So. 2d. 841, 845 (Miss. 1993).

1. Was there a valid and binding contract?

As for the first element, Canyon has not asserted that the CA was invalid.[13] Rather, Canyon asserts that it did not breach the CA, and therefore, the Debtor is not entitled to monetary damages. As there is no dispute as to whether the CA was a valid contract under Mississippi law, the Court finds that the CA was a valid and binding contract between the Debtor and Canyon.

2. Was the CA breached by Canyon?

The Debtor alleges that Canyon repeatedly breached the terms of the CA in two ways: one, Canyon contacted the Debtor's customers in an attempt to lure their business away from the Debtor; and two, Canyon contacted the Debtor's employees, offered them jobs and hired some of them. The Court will address each allegation separately.

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[11]*Business Commc'ns., Inc. v. Banks*, 90 So.3d 1221, 1224-25 (Miss. 2012) (citation omitted). *See also Horton Archery, LLC v. Farris Brothers, Inc.*, Case No. 2:13-cv-260-KS-MTP, 2014 WL 2993662, at *2 (S.D. Miss. July 2, 2014).

[12]*Id.* at 1225. (citations omitted).

[13]Under Mississippi law, the elements of a valid contract are: "(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with [the] legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation." *Rotenberry v. Hooker*, 864 So. 2d 266, 270 (Miss. 2004) (citation omitted).

a. Did Canyon contact the Debtor's customers in violation of the CA?

From 2007 until 2012, Billy W. Bunch, Jr. (Bunch) worked for the Debtor as Vice President of Operations. As head of operations, Bunch was responsible for hiring employees, keeping the drilling rigs running, keeping up with the crews who worked on the rigs, and addressing operational issues between the Debtor and its customers.[14] Bunch's actions during and after his employment with the Debtor form the centerpiece of the Debtor's claims against Canyon.

At trial, the Debtor introduced as exhibits numerous emails between Bunch and Canyon and emails between Bunch and other parties. The Debtor contends that these emails show that Canyon breached the CA immediately after Canyon signed the CA on January 17, 2012.

i. Trial Exhibit 11 (Sterne Email)

Trial Exhibit 11 is an email string (Sterne Email) which began on December 19, 2011. The Sterne Email originated from Gary Holley (Holley). At the time, Holley was President and CEO of Canyon. Holley sent the Sterne Email to Gregg Woodie (Woodie) at Sterne Agee. Holley states that he had attached to the email Canyon's *bona fide* interest letter (Trial Exhibit 3B) and a copy of a signed nondisclosure agreement. Subsequently, there were changes made to the CA, and on January 12, 2012, Woodie sent the new CA to Holley. Holley forwarded the Sterne Email from Woodie to Mike Marshall (Marshall).

Marshall was on the board of directors for Canyon, and with 55% of the stock, Marshall was the largest stock owner of Canyon.[15] After receiving the Sterne Email from Holley, Marshall forwarded the Sterne Email to Bunch on January 12, 2012. According to the Sterne Email, Bunch's

[14]Trial Exhibit 21 at 7-8.

[15]Trial Exhibit 19 at 9.

response to Marshall was "Sounds great."[16]

When Bunch was questioned[17] about the Sterne Email, Bunch admitted that the Sterne Email had his signature block on it and that it was his email address. However, he stated that "I don't think I've ever seen this. I don't think I sent this e-mail, that I know of." When questioned further, Bunch inferred that someone else could have sent the reply of "Sounds great" to Marshall. Bunch stated "We didn't have locked e-mails with [the Debtor]. We was *[sic]* on a *[sic]* open system."[18]

ii. Trial Exhibit 12 (Apache Email)

Trial Exhibit 12 is a series of emails which began with an email from Chris Jamerson (Jamerson) of Apache Corporation (Apache) to Bunch on January 23, 2012 (Apache Email) . At the time, the Debtor was drilling wells for Apache, and Apache was one of the Debtor's best customers.[19] All of the emails contained in the Apache Email were sent after Canyon had signed the CA on January 17, 2012. Jamerson asks Bunch to send him information on "your 900 & 1,000 HP rigs."[20] The next day, on January 24, 2012, Bunch forwarded the Apache Email to Marshall with the notation for Marshall to "Send to Gary please."[21]

The next three pages of the exhibit are an email exchange between Bunch and Holley regarding the information on the 900 and 1,000 horsepower rigs Bunch was sending to Apache. On

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[16]Trial Exhibit 11.

[17]Neither Marshall, Holley nor Bunch testified at the trial. Instead, the parties submitted the transcripts of their depositions as exhibits.

[18]Trial Exhibit 21 at 124-125.

[19]Transcript at 13.

[20]Trial Exhibit 12 at 1.

[21]*Id.*

the last page of the Apache Email, Holley states to Bunch: "[Canyon] would like to put a rig to work for Apache. Appreciate the help."[22] At the time of this exchange, Bunch was an employee of the Debtor.

When questioned about the Apache Email during his deposition, Bunch admitted that the Debtor did not have either a 900 or a 1,000 HP rig,[23] and Bunch admitted that at that time he was working for the Debtor and not Canyon.[24] However, when asked about the content of the Apache Email, Bunch again gave equivocal answers:

> Q: Do you recognize those e-mails, Mr. Bunch?
>
> A: I think so. I'm not 100 percent sure.
>
> Q: The first one is an e-mail. That's from you, . . . to Jamerson, drilling engineer at Apache Corporation. What are those 900 and 1,000 horsepower rigs that you apparently discussed with him? "As discussed, would you please send me inventories on 900 and 1,000 horsepower rigs?"
>
> A: Mr. Noble, I don't recall.
>
> . . . .
>
> Q: My question to you, Mr. Bunch, is, based on this e-mail, it appears you're trying to help put Canyon rigs to work for Apache, which was at the time [the Debtor's] best customer. Why was any of that going on?
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> A: Like I said, I don't – I can't honestly answer that. I don't know, because it could

[22] *Id.* at 4

[23] Trial Exhibit 21 at 127.

[24] *Id.* at 128.

have something to do with that meeting and what was going on in that process, Mr. Noble. So I can't answer that. Don't know.

Q: Did you understand that Canyon was under a Confidentiality Agreement at that time?

A: No.[25]

iii. Trial Exhibits 13, 14 & 15

As to the next series of email exhibits (Trial Exhibits 13, 14 & 15), Bunch testified that he knew about these emails. He testified that they related to the purchase of rigs and/or parts for rigs by the Debtor. When it was decided that the Debtor was not interested in the parts/rigs, Bunch testified that he passed the information on to Canyon.[26]

iv. Trial Exhibit 16

Trial Exhibit 16 is an email from David "Grumpy" Farmer (Farmer), President and CEO of the Debtor, to Bunch (Grumpy Email). Attached to the Grumpy Email is a spreadsheet with the names and salary information of all of the employees who worked on the Debtor's rigs. After Bunch received the Grumpy Email on February 21, 2012, he forwarded the Grumpy Email to "Alan" at Red Mountain Resources[27] on February 22, 2012. When asked about the Grumpy Email, Bunch denied knowledge of the email.[28]

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[25]*Id.* at 126-29.

[26]*Id.* at 132-35.

[27]Red Mountain Resources was one of the companies bidding on the purchase of the Debtor's assets.

[28]*Id.* at 143-47.

v. Testimony at trial

Farmer testified that he was told by a salesman that he ran into Bunch at Linn Energy's offices. The salesman told Farmer that Bunch had told him that the Debtor's Rig 22, which was working for Linn Energy at the time, was going to be working for Canyon.[29]

Farmer's testimony was vague as to exactly when this conversation occurred. He stated that it was at the "[b]eginning of the sales process."[30] The "sales process" occurred in the early part of 2012 with the auction being held on March 27, 2012.[31] Therefore, this event occurred, according to Farmer, while Bunch was still an employee of the Debtor. The Debtor has not produced any evidence to show that Canyon was aware of or was involved in this solicition of Linn Energy.

Ralph McDaniel (McDaniel), a tool pusher who left the Debtor to work for Canyon, testified that after he began working for Canyon, he and Bunch contacted both Apache and Linn Energy in an attempt to obtain work for Canyon.[32] However, he stated that their attempt was unsuccessful and that Canyon did not obtain any work from either Apache or Linn Energy.[33]

vi. Summary

The Court has already found that the CA was a valid and binding contract between the Debtor and Canyon. The Court next must determine if the CA was breached by Canyon.

After examining these exhibits and the testimony, the Court finds that the Sterne Email was

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[29]Transcript at 25.

[30]*Id.* at 26.

[31]*See Report of Result of Auction,* Case No. 10-01815EE, Dkt. #759, p. 4.

[32]Transcript at 68, 87.

[33]*Id.* at 87.

not a violation of the CA because it occurred prior to the date Canyon signed the CA. Moreover, the Grumpy Email has no bearing on the issue of whether Canyon violated the CA (even assuming that Bunch received it and forwarded it to someone at Red Mountain Resources) because Canyon was not a party to the Grumpy Email.

As noted above, Bunch testified that he knew about Trial Exhibits 13, 14, and 15 and could explain these emails. He testified that these emails related to the sale/purchase of rigs and/or parts for rigs. With no evidence to the contrary, the Court believes the testimony of Bunch regarding these emails only and finds that these emails are not proof that Canyon violated the CA.

However, the Apache Email and McDaniel's testimony are problematic for Bunch and Canyon. McDaniel testified that he and Bunch contacted both Apache and Linn Energy in an attempt to obtain work for Canyon. This contact violated the CA.

The Apache Email exchange was sent after Canyon had signed the CA. In the Apache Email, Holley specifically states that Canyon wanted to put a rig in operation with Apache, and Holley then thanked Bunch for his assistance.

Not surprising, when asked about the specifics of the Apache Email, Bunch could not recall it and did not know anything about it. The Court finds that Bunch is not a credible witness regarding the Apache Email. Bunch was able to remember and explain Trial Exhibits 13, 14, and 15, but was unable to remember or explain the Apache Email which was sent during the same time frame as Trial Exhibits 13, 14, and 15.[34]

The Court finds it curious that as to the one email that shows that Bunch was involved with helping Canyon solicit the Debtor's customers, Bunch suggest that someone else might have

[34]The Apache Email exchanged occurred from January 23, 2012, to January 26, 2012. Trial Exhibits 13, 14, and 15 were sent between January 13, 2012, and February 2, 2012.

obtained access to his email account and sent the Apache Email without his knowledge. However, he does not have any doubt about the validity of the emails in Trial Exhibits 13, 14 and 15, which were sent around the same time.

Considering the Apache Email and the testimony, the Court finds that with the help of Bunch, Canyon violated the CA by contacting Apache and Linn Energy and attempting to obtain business from both Apache and Linn Energy. Both activities violated the CA signed by Canyon.

b. Did Canyon breach the CA by hiring the Debtor's employees?

Between July 4, 2012, and August 5, 2012, fourteen of the Debtor's employees left their jobs with the Debtor and immediately, or shortly thereafter, began working for Canyon. The first to leave was Bunch. Two others, McDaniel and Don White followed several days later. The final group of employees left in late July and early August. The Court will address these employees separately.

i. Billy Bunch

Bunch testified as to when he left his employment with the Debtor and when he began working for Canyon. However, Bunch gave equivocal answers. As to the date he left his employment with the Debtor and began working for Canyon, Bunch testified:

> •Left the Debtor in March of 2012. (Trial Exhibit 21 at 13).
> •Began working for Canyon between "August and June" of 2012. (*Id*. at 16.).
> •Began working for Canyon between "May and June" of 2012. (*Id.* at 24.).
> •Start date with Canyon was in July 2012. (*Id.* at 75.).

The Court finds more creditable the testimony of Farmer and Holley. Farmer testified at trial that Bunch was employed with the Debtor until July 4, 2012.[35] In addition to Farmer's testimony, the payroll records of the Debtor collaborates this date. The Debtor's payroll records[36] show that

[35]Transcript at 28.

[36]Trial Exhibit 9.

Bunch received his last paycheck from the Debtor for the pay period ending July 10, 2012.[37] Holley testified that Bunch began working at Canyon on July 1, 2012.[38] The Court finds that Bunch left his employment with the Debtor on or about July 4, 2012, and began working for Canyon around the same date.

The Court acknowledges that there is a lot of testimony regarding meetings and communications between Bunch and Canyon.[39] The Court also acknowledges that when Bunch was asked about a June 10, 2012, reservation made by Canyon for him at a hotel in Oklahoma City,[40] Bunch could not recall what the reservation was for nor did he know if the reservation was related to his possible employment at Canyon.[41]

The Court finds that the Debtor has shown that when questioned, Bunch appeared to have a convenient memory and that Bunch was generally not a credible witness. However, the Court does not find that the Debtor has proven that before Bunch left his employment with the Debtor, on or about July 4, 2012, that Canyon was the party who first approached Bunch about employment with Canyon. Considering the actions of Bunch from January 2012, until July 2012, the Court finds more

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[37]Without specifically reciting Bunch's deposition testimony, Bunch did not know if the payroll records were correct and could not remember if he had gotten paid by the Debtor through July 10, 2012. (Trial Exhibit 21 at 82-90). When asked his basis for saying that the payroll records were incorrect, Bunch stated that he "would have to go back and look at my check stubs that I have on file to actually say whether they was *[sic]* actually truth or not." *Id.* at 86. The Court does not find Bunch's testimony regarding when he was paid by the Debtor to be credible.

[38]Trial Exhibit 20 at 48.

[39]Holley testified that at the June meeting with Bunch, Bunch asked them to hire him at Canyon. Trial Exhibit 20 at 65.

[40]Trial Exhibit 10.

[41]Trial Exhibit 21 at 92-93.

credible Holley's statement that Bunch was "beating our door down to go to work for us."[42] Consequently, the Court finds that Canyon did not breach the CA with regard to the hiring of Bunch.

ii. Ralph McDaniel and Don White

McDaniel and Don White (White) both left the employment of the Debtor on July 10, 2012. (Trial Exhibit 5). McDaniel testified as to the events which led up to his leaving his employment with the Debtor. McDaniel testified that in June of 2012, when he and Bunch were still working for the Debtor, Bunch contacted him and told him that Marshall wanted to talk with him and White about their coming to work at Canyon.[43]

On June 21, 2012, McDaniel, White and Bunch went to Canyon's offices in Big Spring to meet with Marshall.[44] McDaniel testified that before they arrived at Canyon's offices, Bunch told him that Marshall was tied up and that they would be meeting with Holley instead. After their meeting with Holley, McDaniel testified that he told Bunch that he was not interested in working for Canyon because Canyon would not supply him with a truck nor pay his insurance–both of which he had with his employment with the Debtor.[45]

McDaniel stated that he went home for his days off, and a few days before he was scheduled to go back to work on the Debtor's rig, Bunch called him and told him that Marshall had given him the money to purchase a truck for McDaniel. McDaniel stated that he took the job because "I kind of felt obligated after they started doing what I had demanded." (Transcript at 63-64.)

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[42]*Id.*

[43]Transcript at 60.

[44]*Id.* at 60-61; Trial Exhibit 19 at 25; Trial Exhibit 21 at 89.

[45]Transcript at 61-62.

In his deposition, Marshall at one point states that he was not the person who negotiated with and hired McDaniel and White. Marshall stated that Holley was the one who offered McDaniel and White jobs and that Holley was the person who told them that Canyon would meet their demands of supplying them each with a truck and paying 100% of their insurance.[46]

However, he also testified that "[Holley] didn't know that [Bunch] had filed bankruptcy and couldn't even have a truck. So that's when I stepped to the plate and said, 'Well, I will arrange to get you a truck.' . . . . Then we found out that we had to do the same thing for [McDaniel] and for [White]."[47]

Holley's recollection of how McDaniel and White were hired differed from Marshall. Holley testified that he was told by Marshall to meet with Bunch, McDaniel and White on June 21, 2012, and to answer their questions "about insurance and vehicles and how we did things. And we met in Big Spring, and it wasn't a job offer. We didn't talk salaries or anything. I was just answering questions."[48]

Holley testified that Bunch was supposed to call him the following day to let him know what they were thinking as to a salary, but he never heard back from Bunch.[49] Instead at some point, Marshall told Holley that Canyon was going to purchase three trucks: one each for Bunch, McDaniel and White.[50]

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[46]Trial Exhibit 19 at 26-28.

[47]*Id.* at 27-28.

[48]Trial Exhibit 20 at 68.

[49]*Id.* at 69.

[50]*Id.*

Holley testified that after his June 21, 2012, meeting with Bunch, McDaniel and White, Holley did not have any further discussions with the three about their salaries and benefits. Holley stated that he did not know that McDaniel and White had been hired until they showed up on July 9, 2012, to fill out their paperwork.[51]

Not surprising, Bunch's recollection of the June 21st meeting and the hiring of McDaniel and White differs from McDaniel's and Holley's accounts. When asked if Bunch knew McDaniel was looking for a job, he replied: "Mr. Noble, we met several times at my house – Ralph McDaniel and Don White, at my house during dinner and had several conversations on leaving [the Debtor]."[52]

Bunch testified that Holley knew that McDaniel and White would be at the June 21st meeting; that Holley offered McDaniel and White a job; and that Holley approved the three of them getting a truck and having their health insurance provided.[53]

At first, Bunch stated that McDaniel and White accepted the job at that moment. However, Bunch's answer changed when asked:

> Q. Okay. On the spot, end of story, no further discussion, no negotiation of price, terms?
>
> A. We – I don't exactly remember, Mr. Noble, exactly what all of it was. But at that exact spot, I couldn't – I couldn't honestly say that all three of us took a job at that second, but, yes, we decided that day that we were going to work there.

Trial Exhibit 21 at 105.

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[51] *Id.* at 69-70.

[52] Trial Exhibit 21 at 104.

[53] Trial Exhibit 21 at 104-07.

It is clear to the Court that Holley was not involved in the soliciting of McDaniel and White nor with negotiating the terms of their employment. Indeed, as noted previously, Marshall testified that he was the person who approved the purchase of trucks because "[Holley] didn't know that [Bunch] had filed bankruptcy and couldn't even have a truck."[54] While he was still an employee of the Debtor, Bunch brought McDaniel and White to Canyon's office in order to discuss their employment with Canyon. Bunch then negotiated the terms of their employment with Marshall.[55]

The Court does not have reason to doubt that Bunch told McDaniel that Marshall wanted to talk to him about working at Canyon. However, other than what Bunch told McDaniel, the Court has not been presented with convincing proof that Marshall, or anyone at Canyon, actively solicited McDaniel and White in violation of the CA. Therefore, Canyon did not violate the CA when it hired McDaniel and White.

iii. The Rig Employees

As shown in Trial Exhibit 5, between July 24, 2012, and August 5, 2012, eleven other employees left their jobs with the Debtor and began work for Canyon. As shown below, Trial Exhibit 5 lists the following: the names of the employees; the date they left their employment with the Debtor; their job; and the rig number they were working on at the time they left the Debtor:

See Next Page

[54]Trial Exhibit 19 at 27.

[55]Transcript at 62-64.

Bradley Lebaron	07/24/2012	Toolpusher	Rig #14
Clint Pool	07/25/2012	Driller	Rig #14
Kyle Pool	07/25/2012	Derricks	Rig #14
Charles Shipp	07/25/2012	Motor	Rig #14
Michael Mooney	07/25/2012	Floors	Rig #14
Joshua Davenport	07/27/2012	Motor	Rig #14
Anthony Ates	07/27/2012	Floors	Rig #14
Corey Donald	07/27/2012	Floors	Rig #14
Richard Nicholson	08/02/2012	Toolpusher	Rig #22
Dustin Loper	08/05/2012	Toolpusher	Rig #14
John Hosey[56]		Shop	

(Trial Exhibit 5). For purposes of these proposed findings, these employees will be collectively referred to as the Rig Employees.

As is evident from the list above, all of the Rig Employees left their employment with the Debtor after Bunch, McDaniel and White were employed by Canyon. The Debtor alleges that Canyon solicited and hired these employees in violation of the CA. Canyon, in contrast, alleges that the Rig Employees came to them looking for jobs.

In support of its position, the Debtor called Dylan Atteberry (Atteberry) to testify. Atteberry is a rig manager/toolpusher for the Debtor. At the time in question, Atteberry was one of the rig managers/toolpushers for Rig 22. Atteberry testified that while Bunch was still employed by the Debtor and was his supervisor, Bunch repeatedly tried to recruit him to work for Canyon; however, Atteberry declined his offers.[57] Further, Atteberry testified that Bunch also tried to recruit the employees from his (Atteberry's) rig and from other rigs.[58]

After Bunch left his employment with the Debtor and started working for Canyon, Atteberry

[56]Other than where he worked, no information was given for Mr. Hosey.

[57]Transcript at 90-91.

[58]*Id.* at 93.

testified that on several more occasions Bunch contacted him and offered him "money, salary, [and a] truck"[59] if he would come to work for Canyon.

Atteberry further testified that Richard Nicholson (Nicholson) worked with him on Rig 22– that Nicholson was the other rig manager/toolpusher for Rig 22. After Nicholson left the Debtor and began working for Canyon, Atteberry testified that Nicholson came to the site where Rig 22 was operating and attempted to get the entire crew for Rig 22 to leave all at once and go to work for Canyon.[60]

Again, it is not surprising that Bunch's testimony differs from Atteberry's testimony. When Bunch was asked if he had called Atteberry and tried to recruit him to come to work for Canyon, Bunch replied: "Not to my knowledge."[61]

In his deposition, Holley testified as to the standard procedure followed by Canyon when hiring and firing employees before Bunch began working there. Holley explained that Canyon's human resources (HR) department was located in Oklahoma City, and that his wife, Mel Holley, did the majority of the paperwork. Prior to Bunch's arrival at Canyon, Canyon's procedure was that a prospective employee would fill out an application, take a drug test and then HR would tell the operations manager in the field whether the employee was eligible to hire.[62]

Holley testified that Bunch, as Vice President of Operations at Canyon,[63] was authorized to

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[59]*Id.* at 98.

[60]*Id.* at 94-95.

[61]Trial Exhibit 21 at 115.

[62]Trial Exhibit 20 at 46-47.

[63]Trial Exhibit 3A.

hire and fire employees.[64] However, Holley stated that Canyon always had a low turnover of employees partly due to their Legacy Program. Canyon's Legacy Program rewarded the employees who had been with Canyon from the inception. Of their 140 employees, "half of the 140, had been with the company for – really from the start of the company. So our turnover is actually about, probably, 8 or 10 percent of our hands."[65]

Holley testified that in late July,[66] Bunch fired 12 employees from one of the Canyon rigs in addition to a few other rig employees. Holley stated that he was not involved in the decision to fire these employees. Holley testified that "as soon as Mr. Bunch got put in as VP of operations, the communication with me stopped. He quit talking to me, and he would really only deal with Mike Marshall."[67]

In discussing the employees fired by Bunch, Holley acknowledged that there are times when a drilling company needs to replace employees with more experienced employees, however, "not to this level."[68] Holley stated that all of the employees fired by Bunch were competent employees who had been with Canyon for awhile. In particular, Holley stated that two of the toolpushers Bunch fired were "excellent tool pushers – and [he] replaced them with one kid that had never even pushed tools."[69]

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[64] *Id.* at 60.

[65] *Id.* at 57.

[66] *Id.* at 63.

[67] *Id.* at 56.

[68] *Id.* at 61.

[69] *Id.*

Bunch replaced the fired Canyon employees with the Rig Employees from the Debtor.[70] Holley stated that he was not at the meetings "when they made the decisions, privy to the discussions with the hands they hired to take these hands' place."[71] Holley did not know if any of the Rig Employees followed Canyon's normal hiring procedure of submitting an application, drug testing and an eligibility determination.[72]

Holley testified that until the company received a phone call from the attorney for the Debtor, he was unaware that the employees hired by Bunch were the Debtor's employees. Holley stated that "[t]his was a total surprise to us, your call, when all of this happened."[73]

In his deposition, Marshall corroborated Holley's testimony regarding the firing of Canyon's employees and the hiring of the Rig Employees. Marshall agreed with Holley that Bunch was the person responsible for hiring and firing on the drilling level.[74] As to the specific firing of Canyon's employees and the hiring of the Rig Employees, Marshall testified:

> Q. I learned from Mr. Holley that basically an entire crew was terminated and all of these people, all of the [Debtor's] employees, were basically hired thereafter. Do you know who did the firing and the hiring?
>
> A. Billy Bunch had to do it, because we had a big blow-up over it. We had hands, what we call Legacy hands, that had been with us from day one; and we found out

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[70]*Id.* at 59.

[71]*Id.* at 57.

[72]*Id.* at 108.

[73]*Id.* at 62.

[74]Trial Exhibit 19 at 33.

that he was letting them [*sic*] guys go and replacing them with his people. We realized real fast – not fast enough, but pretty fast – there was a pre-mediated goal of Billy's, and that was he was going to have control and have all of his people on all five of our rigs.

Q. Did he tell you that beforehand?

A. Oh, no, sir. I'd have never allowed it, if I had knew *[sic]* that.

(Trial Exhibit 19 at 34).

Marshall further testified that the Rig Employees did not follow Canyon's normal hiring process. Marshall testified:

Q. When did you learn that he had hired and fired various people?

A. It was probably the worst week of my life; and [Bunch] was calling me, complaining about [Holley], and [Holley] was calling me, complaining about [Bunch]. And at that time, [Holley's] wife worked for us as human relations, and she was giving me fits about that we cannot get [Bunch] and his people to take drug tests when he was hiring them. . . .[Bunch] and his people was *[sic]* not taking the drug tests and not doing their paperwork. . . .And we never did get some of those guys to take drug tests.

(Trial Exhibit 19 at 33-34).

As for the Legacy employees he fired, Bunch testified that he fired them because "[t]here were some operations that was *[sic]* going on that wasn't right. They were not fulfilling their job requirements."[75]

[75]Trial Exhibit 21 at 109.

Turning to the Rig Employees he had hired, Bunch testified that all of them had contacted either him or McDaniel about being hired by Canyon.[76] He acknowledged that Canyon had not placed an advertisement anywhere in order to solicit new employees.[77] Rather, the Rig Employees contacted him because they knew him:

> Q. And you hire who you know because you know where to find them and they can come along with you; right?
>
> A. There was *[sic]* guys that had already called and was – I think these guys came along scattered out as they called and asked for – each one of these went through the same thing that everybody did. They filled out an application, they took a drug test to go to work for the company. It was *[sic]* no special privileges given to them in concordance to Canyon Drilling Company. They were a *[sic]* hired employee that had made contact with the company.

(Trial Exhibit 21 at 114).

The Court finds the testimony of Atteberry regarding the attempts by Bunch and Nicholson to hire the Debtor's employees to be credible. The Court also finds to be credible the testimony of Holley and Marshall that until sometime after the Rig Employees came to Canyon, they were unaware that the employees Bunch had hired were the Debtor's Rig Employees.

To the contrary, the Court does not find the testimony of Bunch as to how the Rig Employees came to be employees of Canyon to be credible. The Court finds the evidence shows that after he was employed by Canyon, Bunch contacted the Rig Employees and enticed them to come to work

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[76] *Id.* at 110.

[77] *Id.* at 114.

for Canyon. These actions were in direct violation of the CA.

When questioned about the CA and the provisions regarding the prohibition against contacting the Debtor's employees, Bunch denied that he had ever seen the CA.[78] In a round-about defense of his actions, Bunch acknowledged that he had been told by Farmer that interested purchasers would be coming to look at the Debtor's rigs, but he denied that he was ever told that the interested purchasers were not to speak to the Debtor's employees.[79]

> Q. Okay. I'll ask you again because I want to be clear. Did Mr. Farmer tell you that the people that were coming to look that you were going to show around were not to speak to [the Debtor's] employees or talk to them or ask any questions of anybody but you?
>
> A. I don't think so. I don't recall.
>
> Q. Okay. Did he explain to you that there was a Confidentiality Agreement here that I showed you, this previous Deposition Exhibit 4?
>
> A. No. When I first heard about this is when it was issued to us at Canyon Drilling Company after we had went *[sic]* to work for Canyon Drilling Company.

(Trial Exhibit 21 at 122).

As previously noted, the Sterne Email (Trial Exhibit 11) is an email string which was began on December 19, 2011, when Holley sent a signed CA to Sterne Agee. The email string was eventually forwarded to Marshall, who then sent it to Bunch. According to the Sterne Email,

[78]Trial Exhibit 21 at 119.

[79]*Id.* at 120-22.

Bunch's response to Marshall was "Sounds great."[80]

When questioned about the Sterne Email, Bunch admitted that it was his email address and his signature block, but he stated that "I don't think I've ever seen this. I don't think I sent this e-mail, that I know of" and that "[w]e didn't have locked e-mails with [the Debtor]. We was *[sic]* on a *[sic]* open system."[81]

The Court does not find Bunch's testimony that he was unaware of the CA and had not seen the CA to be credible. Even if by some chance, someone other than Bunch accessed his email, found the Sterne Email, and replied to Marshall, "Sounds good", the Court finds that the evidence shows that Bunch was made aware of the CA when he was still employed by the Debtor.

Farmer[82] and Atteberry[83] testified that every morning a conference call was held with the supervisors of the drilling rigs and the management of the Debtor. As the Debtor's vice president of operations, Bunch was included on every conference call. Atteberry specifically testified that on more than one occasion the CA was discussed during the morning conference call: "Q. Was a non-disclosure agreement, confidentiality ever talked about on those rig calls? A. Yes, sir. More than once."[84] Consequently, the Court finds that Bunch was aware of the CA and that as an employee of Canyon, he violated the CA when he recruited and hired the Rig Employees.

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[80]Trial Exhibit 11 at Page 1 of 2.

[81]Trial Exhibit 21 at 124-125.

[82]Transcript at 26 & 28.

[83]Transcript at 93.

[84]Transcript at 93.

iv. Summary

The Court finds that Canyon did not violate the CA when it hired Bunch, McDaniel or White. However, with regard to the Rig Employees, the Court does find that as an employee of Canyon, Bunch, violated the CA when he actively recruited the Rig Employees to come to work for Canyon. Further, the Court finds when Canyon's other employee, Richardson, attempted to recruit all of the employees of Rig 22, he also violated the CA.

III. Damages

Having found that Canyon violated the CA when it (1) contacted Apache and Linn Energy and attempted to obtain business with Apache, and (2) when Canyon's employees recruited and attempted to recruit the Debtor's employees, the Court must now turn to the issue of damages.

In *Frierson v. Delta Outdoor, Inc.*, 794 So. 2d 220 (Miss. 2001), the Supreme Court of Mississippi addressed the issue of damages in a breach of contract claim. In *Frierson*, Ethel Frierson entered into a five-year lease with Delta Outdoor, Inc. for the purpose of erecting billboards on Ms. Frierson's land. At some point, Ms. Frierson reneged on the lease when she decided to erect her own billboards on her property. Delta sued Ms. Frierson for breach of contract. In addressing the issue of damages, the supreme court held:

> The standard appropriate for the measure of contract damages was reaffirmed in *Theobald v. Nosser,* 752 So. 2d 1036, 1042 (Miss. 1999), when we held that
>
> > [t]he court's purpose in establishing a measure of damages for breach of contract is to put the injured party in the position where she would have been but for the breach. Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of the bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.
>
> . . . .
>
> ¶ 14. However, when the focus is a monetary remedy, that remedy must be such that

> the breaching party is not charged beyond the trouble his default caused. *Wall v. Swilley,* 562 So. 2d 1252, 1256 (Miss. 1990). The law limits speculation and conjecture and imposes duties of mitigation to the injured party. *Id.* Specifically, damages may only be recovered when the evidence presented at trial "removes their quantum from the realm of speculation and conjecture and transports it through the twilight zone and into the daylight of reasonable certainty." *Id.*
>
> . . . .
>
> In sum, we will not allow the only basis for an award of damages to be the injured party's estimate of the extent to which he was injured. It is too speculative and amounts to reversible error.

Frierson, 794 So. 2d at 225-26.

The supreme court recently held that once a party has met its burden of proving a breach of contract claim, a party "seeking monetary damages for breach of contract must put into evidence, with 'as much accuracy as' possible, proof of the damages being sought. Without proof of actual monetary damages, a plaintiff cannot recover *compensatory* damages under a breach-of-contract action." *Business Commc'ns, Inc. v. Banks*, 90 So. 3d 1221, 1225 (Miss. 2012) (citations omitted).

A. Damages for contacting customers.

As noted above, the Court found that Canyon breached the CA when it contacted the Debtor's customers, namely Apache and Linn Energy. Farmer did not offer any proof as to any damages the Debtor suffered due to this breach. At trial, Farmer testified at length as to various contacts he alleged Canyon had with its customers. However, no proof was submitted showing that Apache and/or Linn Energy actually took business away from the Debtor and gave it to Canyon. To the contrary, McDaniel testified that Canyon did not get any business from Apache or Linn Energy.[85] Consequently, the Court finds that the Debtor has failed to "put into evidence, with 'as

[85]Transcript at 87.

much accuracy as' possible, proof of the damages being sought."[86]

However, the Mississippi Supreme Court has held that "[w]here a suit is brought for a breach of a contract, and the evidence sustains the claim, the complainant is entitled to recover at least nominal damages for the failure of the defendant to carry out his agreement." *Callicott v. Gresham,* 249 Miss. 103, 112, 161 So. 2d 183, 186 (1964) (citation omitted).[87]

In *Business Communications,* the Mississippi Supreme Court affirmed an award of nominal damages in the amount of $1,000 as being "well within the continuum of legitimate nominal-damage awards[[88]]"[89] in Mississippi. Consequently, as a result of Canyon breaching the CA by contacting the Debtor's customers, the Court finds that the Debtor is entitled to an award of nominal damages in the amount of $1,000.

B. Damages for contacting Rig Employees.

As stated above, the Court found that Canyon violated the CA when it contacted and hired

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[86]*Business Commc'ns Inc.,* 90 So. 3d at 1225 (citation omitted).

[87]*Id.* at 1226.

[88]*See Ondine Shipping Corp. v. Cataldo,* 24 F. 3d 353, 355, 357 (1st Cir.1994) (affirming nominal damages of $1,000 after the plaintiff failed to prove damages); *Taquino v. Teledyne Monarch Rubber,* 893 F.2d 1488, 1490 (5th Cir.1990) (vacating nominal damage award of $10,000 and remanding "for reconsideration of nominal damages not to exceed $2,000"); *Ryland v. Law Firm of Taylor, Porter, Brooks, and Phillips,* 496 So. 2d 536, 543 (La. App. 1986) (awarding $1,500 in nominal damages for injury to plaintiff's personal and professional reputation due to malicious civil prosecution); *A.E. Landvoigt, Inc. v. Louisiana State Employee Ret. Sys.,* 337 So. 2d 881, 887 (La. App. 1976) (awarding $5,000 in nominal damages on appeal); *Cook Indus., Inc. v. Carlson,* 334 F. Supp. 809, 817 (N.D. Miss. 1971) (more than forty years ago, Chief Judge Keady assessed $500 in nominal damages).

[89]*Business Commc'ns Inc.,* 90 So. 3d at 1226.

the Rig Employees and when Richardson contacted the employees of Rig 22.[90] Farmer testified as to the damages the Debtor incurred as a result of these breaches.

Farmer testified that in the drilling industry, companies do have "roughnecks" who leave. However, he stated that "99.9 percent of them that has *[sic]* ever left us or whatever it is has told us look, I'm going to work the rest of this hitch[[91]] and then I'm taking a job at [X Company]."[92] Farmer stated that the workers will explain that they are leaving because the other job is closer to home, offshore, etc. According to Farmer, "[t]hey always tell us that in case it's not as green on that side."[93]

In the case of four (4) of the Rig Employees, they left their employment with the Debtor during the middle of a hitch.[94] In order to ensure that his rigs could continue to operate and for the safety of the drilling operations, Farmer testified that the Debtor hired three or four guys to be out at the drilling sites in case any other employees left the rigs.[95]

In addition to hiring the three or four extra employees, the Debtor gave all of their rig hands a $1.00 an hour raise. Farmer stated that the raise was an attempt to retain all of the rig hands that

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[90]For the purposes of the discussion of damages, the employees who left the Debtor and the employees of Rig 22 who were solicited by Richardson to go to work for Canyon will be collectively referred to as the Rig Employees.

[91]A *hitch* is a work period used in the drilling industry. Each rig has a night crew and a day crew who each work a *hitch.* They work fourteen, twelve hours day, then they are off for fourteen days. This fourteen-day work period is called a *hitch.* (Transcript at 20).

[92]Transcript at 19. (footnote added).

[93]*Id.*

[94]*Id.* at 20-21.

[95]*Id.* at 21.

were currently working for the Debtor.[96]

As proof of the expenses the Debtor incurred with the pay raise and the hiring of the extra employees, the Debtor submitted as Trial Exhibit 4 (Payroll Exhibit) a multiple page document which shows the Debtor's payroll over fifteen pay periods, from July 12, 2012, to January 24, 2013 (the dates the checks were issued). The Debtor issued payroll checks every two weeks.

The Payroll Exhibit shows that for the July 12, 2012, payment date, the Debtor had 131 employees, and had a total payroll of $433,815.65 (for a two week period). Farmer called this amount its *base*. The Debtor calculated its damages using the figures from this *base*.

According to Farmer, the *base* multiplied by fourteen is $6,073,419.10.[97] Farmer testified that it was after the July 12, 2012, pay check that the Debtor hired the new employees and gave all of their rig hands a raise of $1.00 an hour. The Debtor's payroll for the fourteen pay periods after the *base*, totaled $6,654,228.53. The Debtor claims that the increased payroll costs in the amount of $580,809.43[98] are the damages it incurred as a result of Canyon's breach of the CA.[99]

In addressing the damages for the salaries for the three or four employees the Debtor hired, the Court finds that the Debtor has failed to "put into evidence, with 'as much accuracy as' possible, proof of the damages being sought."[100] First, there is no proof as to the exact number of men hired by the Debtor. Farmer's only testimony was that the Debtor hired an extra "three or four guys".[101]

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[96]*Id.* at 19.

[97]$6,073,419.10 = $433,815.65 x 14.

[98]$580,809.43 = $6,654,228.53 - $6,073,419.10.

[99]*Id.* at 22.

[100]*Business Commc'ns Inc.*, 90 So. 3d at 1225 (citation omitted).

[101]Transcript at 21.

Second, the Debtor failed to specify exactly what it cost the Debtor in salaries to hire these extra three or four employees.[102] The Debtor did not introduce copies of the pay checks for these employees or submit any specific financial records to establish what the Debtor paid these three or four employees. The Payroll Exhibit does not breakdown or separate the salaries of these three or four men. Therefore, in looking at the Payroll Exhibit, the Court has no way of knowing what these employees were paid.

Since damages can only be awarded when "the evidence presented at trial "removes their quantum from the realm of speculation and conjecture and transports it through the twilight zone and into the daylight of reasonable certainty,"[103] the Court finds that it cannot award the Debtor damages for the hiring of the three or four extra employees.

The Court now turns to the damages the Debtor alleges it incurred as a result of having to give its rig hands a $1.00 an hour raise.[104] Farmer did not testify as to the exact date that he gave his rig employees the pay raise, but in reviewing the detailed pay records of the Payroll Exhibit, it appears to have been given in the July 27, 2012, pay check.

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[102]Since at this point in time, the Debtor already had employees who had left their jobs on the rigs, the Court wonders if these three or four new hires were truly "extra" employees or if they were immediately put to work on the rigs where the employees had left.

[103]*Wall*, 562 So.2d at 1256.

[104]On page thirteen of its brief, the Debtor states that "[t]ool pushers were given increased salaries." In support of this statement, the Debtor cites the Payroll Exhibit and page 56 of the transcript. However, there is no testimony on page 56, nor anywhere in the transcript, where Farmer testifies that he gave any of the employees who were on a salary (as opposed to the hourly Rig Employees) an increased salary. The only testimony relates to the $1.00 an hour increase for the Rig Employees. In reviewing the Payroll Exhibit, it does appear that in August some of the salaried employees received a $250 pay increase and some received a $700 pay increase. However, the Debtor failed to present any evidence to support this assertion and cannot do so in a brief. Consequently, in calculating damages incurred by the Debtor, the Court did not consider the alleged pay raises for the salaried employees.

With regard to the $1.00 an hour raise, Farmer testified that "we ended up giving everybody $1 an hour raise that worked for us, our rig hands, to try to keep them. At the time the turmoil of being in bankruptcy and another company offering better money and this, that, and the other."[105] Even though the Court acknowledges that the fact that the Debtor was in bankruptcy did cause some uncertainty for its employees, the Court finds that the main reason the Debtor gave the$1.00 an hour raise was to stop its rig employees from leaving.

Farmer testified that when the employees left Rig 14, they told their boss that they were getting a two dollar an hour raise at Canyon.[106] Farmer further testified that but for its Rig Employees leaving, the Debtor would not have given their rig employees the dollar an hour raise because the market conditions did not favor such a raise.[107] Consequently, the Court finds that with some *digging* into the Payroll Exhibit by the Court, the Debtor has shown with "reasonable certainty"[108] the damages it incurred in having to give its rig employees a raise as a result of Canyon's breach of the CA.

In calculating its damages, the Debtor used the payroll periods from July 12, 2012, to January 24, 2012. There was no explanation from the Debtor as to why the Debtor selected fifteen pay periods,[109] to support its claim for damages.

In its brief, Canyon rightly points out that the Debtor "failed to establish why it is entitled

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[105]*Id.* at 19.

[106]*Id.* at 18.

[107]*Id.* at 55-56.

[108]*Wall*, 562 So.2d at 1256.

[109]Transcript 20-23.

to damages for increased payroll costs over 14 payroll periods."[110] The TRO was entered on August 6, 2012. After that point in time, the Debtor was not in danger of losing more of its employees to Canyon. For purposes of calculating the Debtor's damages, the Court will consider the eight (8) pay periods from July 26, 2012, to November 1, 2012.[111]

The Court finds that when examining the detailed payroll records contained in the Payroll Exhibit, between the July 12, 2012, pay period and the July 26, 2012, pay period, the Debtor did give its rig employees a pay raise. Farmer testified that the Debtor's payroll period was for two weeks.[112] To calculate the damages incurred by the Debtor over the eight pay periods, the Court used the following *formula:*

See Next Page

[110]*Closing Argument Brief,* Adv. Proc. No. 1200086EE, Adv. Dkt. #71,March 24, 2014.

[111]McDaniel testified that the Rig Employees hired by Canyon were laid off in late October or early November of 2012. Transcript at 77. The Court finds this to be an appropriate time frame to calculate the damages the Debtor incurred as a result of Canyon's breach of the CA in hiring the Rig Employees.

[112]Transcript at 22.

- 14 days x 12 hour shifts = 168 hours per *hitch*

- Damages calculation for a 168 hours:[113]
  $1 x 80 hours = $80
  $1.5 x 88 overtime hours = $132
  Total damages of $212 per employee, per pay period

- Total Damages:
  989 Rig Employees x $212 = $209,668.00

The chart below breaks down the calculations per pay period:[114]

PAY DATE	# OF RIG EMPLOYEES	80 HOURS at $80	88 OVERTIME HOURS at $132	TOTAL DAMAGES PER PAY PERIOD
07/26/2012	120	$9,600	$15,840	$25,440
08/09/2012	126	$10,080	$16,632	$26,712
08/23/2012	121	$9,680	$15,972	$25,652
09/06/2012	125	$10,000	$16,500	$26,500
09/20/2012	123	$9,840	$16,236	$26,076
10/04/2012	131	$10,480	$17,292	$27,772
10/18/2014	123	$9,840	$16,236	$26,076
11/01/2012	120	$9,600	$15,840	$25,440
TOTALS	989	$79,150	$130,518	$209,668

Consequently, the Court finds that the Debtor has proven that it incurred damages in the amount of $209,668.00 as a result of Canyon's violation of the CA. The Court finds that in accordance with

[113]Neither the Debtor nor Canyon provided the Court with any guidance as to what constituted overtime. Therefore, the Court used the standard 40 hour work week. (*See Fair Labor Standards* found at Title 29 of the United States Code.) Since the Debtor's pay period was for two weeks, any time worked over 80 hours was calculated as overtime.

[114]The column on the Payroll Exhibit for *No. of Employees* included the Debtor's salaried employees. The Court deducted the salary employees from this number to arrive at the total number of rig employees who received the dollar an hour pay increase.

Mississippi law, this amount is reasonable and that Canyon is "not charged beyond the trouble [its] default caused"[115] the Debtor.

According to the Payroll Exhibit, over these eight pay periods, the Debtor also paid "OIL PD" and "PD" for its rig employees.[116] However, the Debtor did not offer any testimony as to which employees (salaried or hourly) received any of these items nor did the Debtor explain what "OIL PD" and "PD" are. Consequently, the Court finds that these two categories will not be considered in calculating the Debtor's damages as they are too speculative and uncertain.[117]

C. Summary

The Court finds that with regard to Canyon's breach of the CA for contacting the Debtor's customers, the Debtor has failed to "put into evidence, with 'as much accuracy as' possible, proof of the damages being sought."[118] However, under Mississippi law, since the Debtor has proven that Canyon breached the CA by contacting its customers, it is entitled to an award of nominal damages in the amount of $1,000.00.

As for Canyon's breach of the CA by contacting and hiring the Rig Employees, the Court finds that the Debtor is entitled to damages as a result of this breach. The Court finds that the Debtor is entitled to $209,668.00, which the Debtor incurred as a result of having to give its rig employees a pay raise.

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[115]*Wall* 562 So. 2d at 562.

[116]Trial Exhibit 4 at unnumbered p. 1.

[117]*Wall*, 562 So. 2d at 1256.

[118]*Business Commc'ns Inc.*, 90 So. 3d at 1225 (citation omitted).

IV. Attorney's Fees

Section nine (9) of the CA, provides that the Debtor is entitled to attorney's fees it incurs in bringing any lawsuit to enforce the provisions of the CA.[119] In its Complaint, the Debtor requests "all costs, including legal fees, for [Canyon's] breaches of the CA."[120]

In Mississippi, "[a]ttorney's fees can be awarded where statutory authority or a contractual provision provides for an award of attorney's fees or where punitive damages are also awarded." *T. Jackson Lyons & Associates, P.A. v. Precious T. Martin, Sr. & Associates, PLLC*, 87 So. 3d 444, 452 (Miss. 2012) *citing Mississippi Power & Light Co. v. Cook*, 832 So. 2d 474, 486 (Miss. 2002). "However, the party requesting an award of attorney's fees bears the burden of providing evidence to support the amount requested. *See Erickson v. Smith*, 909 So. 2d 1173, 1182 (¶ 26) (Miss. Ct. App. 2005) (holding that an award of attorney's fees must be based on credible evidence)." *Puckett v. Gordon*, 16 So. 3d 764, 773 (Miss. Ct. App. 2009).

In *Erickson*, the plaintiff (Erickson) filed suit against the builder of his town home. Erickson alleged that his town home lost value because the promised amenities were never built in the development. Erickson sought attorney's fees based on a section of the contract he entered into when he purchased the town home. In denying the request for attorney's fees, the chancellor found that "although Erickson raised the issue in his pleadings, he did not request attorney's fees or litigation expenses in his testimony or offer any proof as to the amounts of such."[121]

In affirming the lower court's denial of the plaintiff's request for attorney's fees, the

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[119]Trial Exhibit 1, *Non-Disclosure and Confidentiality Agreement*, p. 4.

[120]*Verified Complaint for Temporary and Permanent Injunctive Relief and for Other Relief*, Adv. Proc. No. 1200086EE, Adv. Dkt. #1, ¶ 33, p. 5, August 6, 2012.

[121]*Erickson*, 909 So.2d at 1178.

Mississippi Court of Appeals found that

> an award of attorney's fees must be supported by credible evidence; "[w]hen a party fails to present competent evidence to determine attorney's fees, the award may be denied." *Romney v. Barbetta*, 881 So. 2d 958, 962 (¶ 20) (Miss. Ct. App. 2004). Erickson presented no proof of attorney's fees or litigation expenses at trial. Although he now submits that "[m]ost trial courts will rule on the issue of attorney fees and allow the submission of an attorney fee affidavit as to the total fees paid," he cites no authority requiring the court to take evidence in this manner. Erickson's failure to offer proof at trial was done at his own peril.

Erickson, 909 So.2d at 1182.

In the case at bar, on October 31, 2013, the Court noticed out the pre-trial Conference and the trial on the Complaint and the Answer.[122] The pre-trial Conference was set for January 21, 2014, and the trial was scheduled for January 30, 2014.

Even though the Debtor had almost three (3) months to prepare for the trial, the Debtor failed to submit any testimony or proof at the trial as to the attorney's fees it requested in its Complaint. The Debtor did not submit time sheets, bills or any evidence of the attorney's fees it had incurred in filing suit against Canyon for the breach of the CA.

In its *Plaintiffs' Post-Trial Brief* (Debtor's Brief), the Debtor states that it "is entitled to recover attorneys' fees and costs as provided in ¶ 9 of the CA, which have been properly pled. [The Debtor] will provide all requisite evidence of these fees and costs upon entry of a judgment in its favor on the primary claims and as directed by the Court."[123]

At the trial, there was no stipulation, agreement between the parties, or announcement that the issue of attorneys' fees would be addressed by the Court at a later date. At the conclusion of

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[122]*Notice of Pre-Trial Conference and Trial Setting*, Adv. Proc. No. 1200086EE, Adv. Dkt. #44, October 31, 2013.

[123]*Plaintiffs' Post-Trial Brief*, Adv. Proc. No. 1200086EE, Adv. Dkt. #70, p. 14, March 24, 2014.

Atteberry's testimony, the Debtor was asked "THE COURT: Do you rest? MR. NOBLE: Yes, sir."[124]

The Debtor rested without submitting any proof or evidence of the attorney fees it incurred in bringing this action against Canyon for breach of the CA. The Court finds that the Debtor's failure to submit any proof or evidence at trial as to the issue of its attorneys' fees "was done at [its] own peril." *Erickson,* 909 So. 2d at 1182.

The Court will note that the statement contained in the Debtor's Brief is not sufficient to preserve the issue of attorneys' fees. "[A] . . . [m]emorandum is not a pleading from which the Court grants relief." *In re Gilmore, Jr.,* 198 B.R. 686, 692 n.4 (Bankr. E.D. Tex. 1996), *amended in part on reh'g,* 1996 WL 1056889 (Bankr. E.D. Tex. 1996), *aff'd, United States v. Gilmore,* 226 B.R. 567 (E.D. Tex. 1998). "[B]ecause a memorandum or brief does not constitute a pleading, a request for relief contained therein cannot constitute a written motion." *In re Allegheny Health, Educ. & Research Foundation,* 233 B.R. 671, 683 (Bankr. W.D. Pa. 1999); *see also Vidalia Dock & Storage Co., Inc. v. Donald Engine Service, Inc.,* 2008 WL 115199, *2 (W.D. La. Jan. 9, 2008) (motion in brief was "deemed deficient"); *Material Products Int'l, Ltd. v. Ortiz (In re Ortiz),* 441 B.R. 73, 82 (Bankr. W.D. Tex. 2010) ("[T]he Plaintiff's request to amend should be stricken simply because it is improperly made in a responsive pleading. Fed. R. Bankr. P. 9013.").

Since a brief "is not a pleading from which the Court grants relief,"[125] the Debtor's statement/request contained in the Debtor's Brief regarding the submission of proof as to attorney fees at a later date is deficient and is not properly before the Court. For these reasons, the Debtor's

[124]Transcript at 105.

[125]*In re Gilmore,* 198 B.R. at 692 n. 4.

request for attorneys' fees is denied.

CONCLUSION

The Court found that the CA was a valid and binding contract between the Debtor and Canyon. The Court then found that Canyon breached the CA when it, with the help of Bunch, contacted Apache and Linn Energy and attempted to obtain business from both Apache and Linn Energy.

As to the employees, the Court found that Canyon did not violate the CA when it hired Bunch, McDaniel or White. However, with regard to the Rig Employees, the Court found that employees of Canyon, namely Bunch and Richardson, violated the CA when they actively recruited the Rig Employees to come to work for Canyon.

As to the issue of damages, the Court found that pursuant to Mississippi law, the Debtor is entitled to nominal damages of $1,000.00 for Canyon's contacting the Debtor's customers in violation of the CA. As for Canyon's breach of the CA by contacting and hiring the Rig Employees, the Court finds that the Debtor is entitled to damages in the amount of $209,668.00.

The Court further found that since the Debtor failed to present any proof as to the attorneys' fees it requested in its Complaint, the Debtor's request for attorney fees should be denied.

Recommendation

For the reasons expressed above, the Court recommends to the District Court that it grant the Debtor nominal damages in the amount of $1,000.00 for Canyon's breach of the CA in contacting the Debtor's customers.

The Court further recommends that the District Court grant the Debtor damages in the amount of $209,668.00 for Canyon's breach of the CA in contacting and hiring the Rig Employees.

The Court further recommends that the District Court deny the Debtor's request for

attorneys' fees which is contained in its brief.

END OF PROPOSED FINDINGS