# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

## IN AND FOR NEW CASTLE COUNTY

| TWA RESOURCES., formerly known as APPALACHIAN WELL SERVICES,        | )                                    |
|---|--------------------------------------|
| INC., a Pennsylvania corporation,                                   | )                                    |
| Plaintiff,  | ) C.A. No. N11C-08-100 MMJ<br>) CCLD |
| V.  |                                      |
| COMPLETE PRODUCTION SERVICES, INC., a Delaware corporation and AWS, | )<br>)                               |
| INC., a Delaware corporation,                                       | )                                    |
| Defendants.   | )<br>)                               |

Submitted: June 17, 2013 Decided: July 30, 2013

# **OPINION FOLLOWING TRIAL**

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JOHNSTON, J.

#### **FACTS**

#### The Parties

Plaintiff Appalachian Well Services, Inc. ("Appalachian") was founded by Jackie Albert ("Albert") and Douglas Henson ("Henson") in 1987. In 2006, Appalachian acquired Titan Wireline Service, Inc. ("Titan"). Appalachian was an oil field services company in the business of performing fracturing and cementing services related to oil and natural gas extraction. Through its subsidiary, Titan, Appalachian also supplied coiled tubing, perforation, and logging services in the Allegheny Plateau region of the northern Appalachian Basin.

The Marcellus Shale is a geographic formation that stretches from Ohio and West Virginia into Pennsylvania and Southern New York, and contains large quantities of natural gas. Due to the depth and tightness of the shale, however, it was cost-prohibitive to exploit these deposits until recently. Developments and advancements in drilling technology, specifically horizontal drilling and high pressure, multi-stage hydraulic fracturing ("fracing"), have made access to these large deposits of natural gas more cost-efficient.

<sup>&</sup>lt;sup>1</sup> Fracing involves pumping fluids into formations of rock, thereby creating a conduit through which natural gas can flow, enabling larger quantities to be extracted more easily.

Prior to 2008, Appalachian engaged in "shallow market" fracturing in the Marcellus Shale. Appalachian was unable to exploit the deposits located in the deeper shale without more powerful equipment. Appalachian began discussions with Complete Production Services, Inc. ("CPX"), as a potential partner for high pressure fracking. Appalachian and CPX exchanged relevant information.

## Letter of Intent

The parties executed a letter of intent ("LOI") in early August 2008. CPX created a wholly-owned subsidiary, AWS, Inc. ("AWS"). Under the terms of the LOI, AWS (the buyer) acquired the assets of Appalachian (including Appalachian subsidiary Titan). Appalachian (the seller) became known as TWA Resources, Inc. ("TWA").

AWS agreed to pay \$48 million in cash, \$12 million in CPX common stock with value determined based upon an average fifteen days' trading prices at closing, and up to \$5 million in contingent consideration. The combined maximum consideration was \$65 million. Additionally, AWS agreed to pay \$8.2 million of the \$12 million purchase price for the Marcellus high pressure frac fleet.<sup>2</sup>

<sup>&</sup>lt;sup>2</sup>A "frac fleet" is a number of pump trucks, sand haulers, manifolds, and other equipment necessary to conduct fracking.

The \$5 million contingent consideration was subject to certain performance targets for CPX's Marcellus Shale business, as calculated from the time of the transaction through December 31, 2010. *First*, TWA would receive a Milestone Payment of a maximum of \$1 million if the earnings before interest, taxes, depreciation, and amortization ("EBITDA") from e-line operations exceeded \$4 million per year during 2009 or 2010. *Second*, TWA would receive a Milestone Payment of a maximum of \$3 million if "Pressure Pumping and Coiled Tubing Operations" generated EBITDA of \$14 million or more over any consecutive twelve-month period during 2009 and 2010. *Third*, TWA would receive an additional \$1 million Milestone Payment if certain targets were achieved in "New Services Lines."

## Asset Purchase Agreement

On October 4, 2008, the parties executed the Asset Purchase Agreement ("APA") and the transaction closed. Albert and Henson became Vice Presidents of AWS, which began operating as a division of CPX.

Section 6.02(a) of the APA contains a covenant whereby TWA, Titan and their shareholders agree not to perform fracing services in the Marcellus Shale.

<sup>&</sup>lt;sup>3</sup>"New Services Lines" include: services, capital requirements, and targets to be agreed upon during the development of an integration and growth plan.

The employment agreements entered into by Albert and Henson, in their roles as Vice Presidents of AWS, contain similar covenants not to compete. These covenants only prohibit TWA and its shareholders - Albert and Henson - from competing with AWS. The agreements do not contain reciprocal language explicitly prohibiting CPX, or any division of CPX, from competing with AWS in the Marcellus Shale high pressure fracing business. The employment agreements also permit AWS to terminate Albert's and/or Henson's employment at will.

Section 2.05 of the APA contains the same terms relating to earn-outs (or Milestone Payments) and Growth Oriented Capital Expenditures as were included in the LOI. For Pressure Pumping and Coiled Tubing Operations, TWA is entitled to an earn-out of up to \$3 million - governed by a stated formula - if EBITDA for the operations is in excess of \$14 million over a consecutive twelve-month period. TWA is entitled to the maximum earn-out of \$3 million if EBITDA from Pressure Pumping and Coiled Tubing Operations reaches \$20 million for a consecutive twelve-month period. The minimum EBITDA threshold for an earn-out and the maximum EBITDA cap subject to an earn-out were to be adjusted based on investment by CPX in "Growth Oriented Capital Expenditures" related to AWS's operations. If EBITDA were not in excess of the minimum EBITDA threshold, however, no Milestone Payment would be owed.

The APA also provides an additional earn-out of up to \$1 million through the offering of new services in the Marcellus Shale. By the terms of the APA, both parties were required to negotiate in good faith concerning a "New Services Milestone." If the parties could not reach an agreement, however, the APA included a "fall back" whereby the New Services Milestone would be calculated as a proportion of the other two earn-outs paid or payable.

## Transfer of Frac Fleets

During 2009, AWS performed three fracing jobs in the Marcellus Shale. On two of the three jobs, serious complications occurred. During the first job (for XTO Energy), a joint of pipe ruptured causing an "iron failure." AWS secured two fracking jobs with East Resources. On one of the jobs, AWS suffered its second iron failure, which led to serious injuries to multiple employees and an OSHA investigation.

Pumpco is a wholly-owned subsidiary of CPX<sup>5</sup> and operates as a division of CPX. In September 2009, CPX transferred a Pumpco high pressure pumping frac

<sup>&</sup>lt;sup>4</sup>An iron failure occurs when a piece of metal tubing ruptures or explodes under high pressure. Iron failures are considered catastrophic events in the oil and gas industry, as flying iron shrapnel can cause extensive equipment damage and personal injury.

<sup>&</sup>lt;sup>5</sup>Pumpco is wholly-owned by Integrated Production Services, Inc., which in turn is wholly-owned by CPX.

fleet from Texas to the Marcellus Shale. This fleet performed five fracing jobs throughout the remainder of 2009. Gross revenues were \$4,426,000.00.

In November 2009, CPX transferred AWS's high pressure frac fleet to Texas. Albert and Henson both agreed to this transfer. After being transferred to Texas, the AWS fleet was broken up and used to supplement Pumpco's other operations.

On January 15, 2010, Albert and Henson were terminated from AWS.

#### Milestone Statements

Section 2.05(d) of the APA requires Buyer to deliver a Milestone Statement detailing the calculation of the Milestone Payments to Seller prior to March 1, 2010 and 2011. Following delivery of the Milestone Statement, Seller had ten business days to deliver a Disagreement Statement. If the parties are unable to negotiate a final determination of appropriate Milestone Payments, they must jointly select an independent auditor of recognized national standing to resolve any disagreement concerning the calculations of the Milestone Payments.

# 2009 Milestone Payment

CPX delivered a Milestone Statement for 2009 on February 26, 2010. The 2009 Milestone Statement included all Pumpco revenue and EBITDA from the Marcellus Shale in calculating the earn-out. CPX calculated a Pressure Pumping

and Coiled Tubing Threshold of \$15,466,895, and a Pressure Pumping and Coiled Tubing Cap of \$21,466,895. Because CPX did not have a positive EBITDA from Pressure Pumping and Coiled Tubing Operations for 2009, CPX determined that it did not owe an earn-out.

Additionally, because no New Services Milestone had been agreed upon by the parties, CPX contended that the New Services Milestone should be calculated based upon the default formula contained in Section 2.05(c) of the APA, which would result in no Milestone Payments for new services.

On March 12, 2010, TWA sent a Disagreement Statement to CPX, pursuant to Section 2.05(d) of the APA, challenging certain aspects of the 2009 Milestone Statement.

On May 4, 2010, the parties met in an attempt to resolve the disagreement regarding the Milestone Payment for 2009, but ultimately were unsuccessful.

CPX then proposed that an independent auditor be selected to review the matter pursuant to Section 2.05(e) of the APA. TWA rejected this proposal.

# 2010 Milestone Payment

Throughout 2010, CPX added three additional frac fleets to the Marcellus Shale. For 2010, CPX's fracing operations in Pennsylvania earned in excess of \$100 million in revenue, and EBITDA of \$34 million.

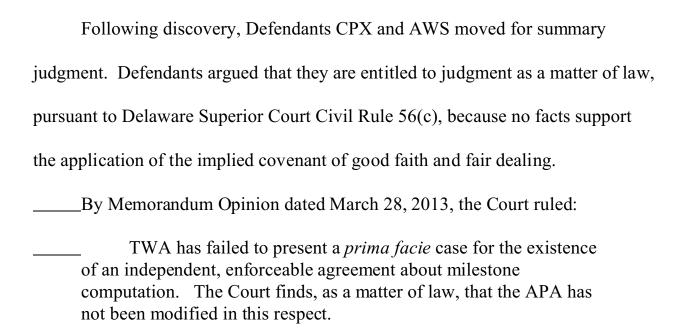
In initially preparing the 2010 Milestone Statement, CPX included the results of Pumpco's entire operation in the Marcellus Shale, as CPX had done when it prepared the 2009 Milestone Statement. With EBITDA calculated for combined operations for 2010 year as \$34 million, TWA would have been entitled to the maximum Pressure Pumping and Coiled Tubing earn-out payment of \$3 million.

CPX subsequently took the position that Pumpco assets should not be included for the 2010 Milestone Statement. Under this calculation, EBITDA earned solely by AWS would be \$0.3 million. Because EBITDA would not have met the minimum threshold, TWA would not be entitled to any earn-out payment.

As an alternative method of calculation, CPX proposed the "replacement fleet" calculation. Under this approach, CPX would include revenue from the first Pumpco fleet deployed to the Marcellus Shale in 2009, but would not include any additional Pumpco operations. TWA disagreed with this approach.

#### **SUMMARY JUDGMENT**

The parties attempted to mediate this dispute in July 2011, but were unsuccessful. TWA brought this action claiming breach of the APA, and breach of the implied covenant of good faith and fair dealing, by CPX and AWS. TWA asserts that CPX and AWS refused to pay earn-outs mandated under the APA.



Because TWA has not requested any specific relief based on Defendants' alleged breach of Section 2.05(c), the Court need not decide any Section 2.05(c) issues at this juncture.

The Court finds that the APA is silent on he question of what happens when there are no "Seller" "Pressure Pumping and Coiled Tubing Operations" in the Marcellus Shale. Silence, however, does not render the APA ambiguous. There is a gap in the APA as to earn-out consideration under the circumstances alleged by TWA. TWA has raised genuine issues of material fact as to whether Defendants have acted arbitrarily or unreasonably, thereby frustrating the parties' reasonable expectations at the time of executing the APA. The Court finds that TWA has established a *prima facie* case for application of the implied covenant of good faith and fair dealing.

## **PLAINTIFF'S BURDEN OF PROOF**

The Court found in the Memorandum Opinion that the finder of fact<sup>6</sup> first must determine the reasonable expectations of the parties to the APA. In order to augment the APA through the implied covenant of good faith and fair dealing, TWA has the burden of proving that Defendants' conduct frustrated the reasonable expectations of the parties to the APA.<sup>7</sup> The Court must decide whether the events affecting calculation of the earn-out were developments that could not have been anticipated, or whether these were developments that the parties simply failed to consider.<sup>8</sup>

If TWA succeeds in demonstrating that its reasonable expectations under the APA have been thwarted, in order to benefit from the implied covenant of good faith and fair dealing, TWA next must prove that Defendants have acted arbitrarily or unreasonably.<sup>9</sup>

<sup>&</sup>lt;sup>6</sup>This case originally was set for trial by jury. Shortly prior to trial, the parties stipulated that the Court conduct a bench trial.

<sup>&</sup>lt;sup>7</sup>Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 442 (Del. 2005).

<sup>&</sup>lt;sup>8</sup>Nemec v. Shrader, 991 A.2d 1120, 1126 (Del. 2010).

<sup>&</sup>lt;sup>9</sup>*Id*.

Questions of fact to be resolved include: whether in response to economic realities CPX acted reasonably in transferring AWS equipment out of the Marcellus Shale; whether CPX acted reasonably in allegedly preventing AWS management from maximizing its profitability; whether CPX was reasonable in allegedly competing against AWS through CPX's other subsidiaries; whether CPX acted in contravention of its alleged assurances that CPX would use its resources to assist AWS in entering and expanding AWS's presence in the Marcellus Shale frac market; and whether Defendants' position in excluding Pumpco revenues from the 2010 earn-out calculations was arbitrary or unreasonable.

Finally, if TWA proves that CPX's Milestone Payment calculations are not consistent with the reasonable expectations of the parties to the APA, and also demonstrates that Defendants have acted arbitrarily and unreasonably, the next issue for the Court is what should be included in the earn-out calculations for purposes of the Milestone Payments.

The questions of fact on this issue are whether the following should be included in the Milestone Payment calculations: all CPX operations in the Marcellus Shale; all Pumpco operations in the Marcellus Shale; only the production of one fleet, to substitute for the single fleet transferred out of the

region; or no operations because Seller's fleet was moved out of the Marcellus Shale.

Upon determination of what should be included or excluded from the calculations, the actual calculations must be performed according to the APA provisions. If the parties cannot agree on these calculations, the matter must be referred to the independent accountant auditor pursuant to Section 2.05(e) of the APA.

#### FINDINGS FOLLOWING TRIAL

The 6-day bench trial began on April 22, 2013. Having heard and considered all of the testimony, documentary evidence, and arguments of counsel, the Court makes the following findings.

# What were the Reasonable Expectations of the Parties at the Time the APA was Executed?

At the time the APA was executed, CPX agreed to support the fracing business conducted by AWS in the Marcellus Shale. Such support was contemplated by the parties to include exchange of customer contacts and introductions to potential AWS customers. The transaction was intended to create a platform for CPX's future growth in the Marcellus Shale.

The APA neither contemplates nor provides for the contingency of removal of the AWS frac fleet out of the Marcellus Shale. It appears that the parties to the APA did not consider removal as a possibility at the time of contracting.

As businesses experienced in the industry, it is not disputed that the parties to the APA contemplated ordinary market fluctuations. However, there is no evidence that any party anticipated the extraordinary economic downturn that occurred in the fall of 2008. The poor performance in the industry beginning in late 2008 was unusual and unexpected. Prior to consummating the APA, the parties relied upon projections of significant income increases beginning in 2009.<sup>10</sup>

In September 2009, CPX transferred a Pumpco high pressure pumping frac fleet from Texas to the Marcellus Shale. In November 2009, the sole AWS high pressure frac fleet was transferred to Texas. This fleet subsequently was broken up and used to supplement Pumpco's other operations.

As of at least October 2009, the approach of CPX was to "[e]stablish both AWS and Pumpco as preferred pressure pumping brands in the Marcellus Shale."

The evidence at trial demonstrates that it reasonably could be anticipated that

<sup>&</sup>lt;sup>10</sup>Defendants' Exhibit ("DX") 2.

<sup>&</sup>lt;sup>11</sup>Joint Exhibit ("JX") 19, at p. 2.

Pumpco and AWS would conduct operations on parallel business tracks. The pretransaction statement of CPX - "Post transaction CPX would like Doug and Jack to manage CPX's Appalachian business"<sup>12</sup> - did not become part of the APA. The Court finds this statement to be aspirational, and it is concededly non-binding.

Section 6.02(a) of the APA contains a covenant prohibiting TWA and its shareholders - Albert and Henson - from competing with AWS. There is no reciprocal non-compete agreement preventing CPX, or any division of CPX, from competing with AWS in the Marcellus Shale high pressure fracing business. If the parties had contemplated that AWS would control all CPX operations in the Marcellus Shale, no matter what the circumstances, the non-compete language would not have been unilateral.

By agreement, Albert and Henson could be terminated at any time after four months. The Milestone Payments were earned, or not, pursuant to the terms of the APA, regardless of whether Albert and Henson remained employed by AWS.

Viewing the evidence produced at trial in its entirety, the Court is not persuaded that there could be a reasonable expectation, under these circumstances, that AWS would supervise and control *all* CPX operations in the Marcellus Shale.

<sup>&</sup>lt;sup>12</sup>Plaintiff's Exhibit ("PX") 1, at p. 14.

At the time the APA was executed, the parties reasonably contemplated that at least one (and hopefully more than one) AWS high pressure frac fleet would operate in the Marcellus Shale, whether or not Albert and Henson continued with AWS. That was the very purpose of the business arrangement. The Court finds that removal of the sole AWS high pressure fleet thwarted the reasonable expectations of all parties to the APA.

## Was Defendants' Conduct Arbitrary or Unreasonable?

The events leading to transferring the AWS fleet to Texas are hotly disputed. However, it is undisputed that Albert and Hanson ultimately concurred with the decision to move the fleet. The Court finds that the actual exchange of the AWS fleet for a Pumpco fleet was neither arbitrary nor unreasonable.

Therefore, the reasons for transfer of the fleet need not be resolved. The following factual issues are deemed moot: whether CPX acted reasonably in allegedly preventing ASW management from maximizing its profitability; whether CPX was reasonable in allegedly competing against AWS through CPX's other subsidiaries; and whether CPX acted in contravention of its alleged assurances that CPX would use its resources to assist AWS in entering and expanding AWS presence in the Marcellus Shale frac market.

The conduct in question is whether CPX acted arbitrarily or unreasonably in calculating the Milestone Payments.

The 2009 Milestone Statement was sent by CPX along with a letter dated February 26, 2010.<sup>13</sup> The letter states:

Pursuant to Section 2.05(d) of the Asset Purchase Agreement ("APA") by and between Complete Production Services, Inc. ("CPX"), AWS, Inc., Appalachian Well Services, Inc., Titan Wireline Service, Inc., and each stockholder of Appalachian Well Services, Inc., with an effective date of October 4, 2008, CPX hereby provides the enclosed year-ending December 31, 2009, Milestone Statement setting forth in reasonable detail the calculation of milestone payments, if any, contemplated by Sections 2.05(a)-(c) of the APA. (Emphasis added.)

The Milestone Statement provides in part:

In December of 2009 CPX moved the Marcellus Frac Spread from the Appalachian region to Texas. Since this group of assets was removed from AWS, CPX will allow the performance of its other subsidiary's pressure pumping operations (Pumpco) in the Appalachian region to count toward potential milestone payments.

CPX concluded: "For the twelve months ended December 31, 2009 total EBITDA generated from CPX's pressure pumping operations in the Appalachian region was \$(567,342); therefore, no milestone payment was earned."

In 2009, only one Pumpco fleet was operating in the Marcellus Shale.

<sup>&</sup>lt;sup>13</sup>JX 24 (Letter and 2009 Milestone Statement).

In 2010, the high pressure fraking business in the Marcellus Shale improved dramatically.

Accompanied by a virtually identical letter, dated March 1, 2011, CPX sent its calculations in the 2010 Milestone Statement.<sup>14</sup> The Statement provides in part:

Replacement Fleet Calculation. Last year in the milestone statement prepared for the year ending December 31, 2009, CPX noted that the original AWS Marcellus Frac Spread was removed from the Appalachian region to Texas. CPX offered the performance of another subsidiary's first Marcellus pressure pumping spread to contribute to the milestone calculations. The offered pressure pumping spread had additional capabilities compared to the equipment of Sellers. The Sellers did not accept CPX's proposal. Thus CPX assumes Henson and Albert would prefer that the calculations be completed based on the original purchase agreement which contains a mechanism to account for additions of capital equipment.

CPX again concluded that no Milestone Payment was earned for 2010.

Even under an alternative calculation, CPX declared that there was no Milestone Payment earned:

Despite there being no contractual requirement to do so, CPX has calculated the milestone payment with additional methodology to show that no milestone payment was earned under any scenario. During 2009 and 2010 approximately \$12.9MM of assets were transferred out of AWS, partially offset by approximately \$3.7MM of growth capital expenditures. Although not provided for in the Agreement even if CPX were to reduce the thresholds as a result of

<sup>&</sup>lt;sup>14</sup>JX 29 (Letter and 2010 Milestone Statement).

the transfers, there is no milestone payment. Accounting for the transfers if the revised Pressure Pumping EBITDA Threshold for the twelve months ended December 31, 2010 is reduced to \$10.4MM and the revised Cap is reduced to \$16.4MM there is no milestone payment.

The Court finds that it was arbitrary and unreasonable for CPX to perform the 2010 Milestone Payment calculations for the specific purpose of concluding that no Milestone Payment was earned. It was arbitrary and unreasonable for CPX to include the Pumpco equipment for the 2009 Milestone Statement, in exchange for the transferred AWS fleet, and not to include at least one Pumpco fleet in the 2010 calculations.

The fact that a Disagreement Statement was sent does not alter the fact that CPX, when it did not matter because profits were negligible, included the Pumpco fleet. The Disagreement Statement did not dispute that the Pumpco fleet should be included in the earn-out calculations.<sup>15</sup>

The Court is not persuaded by the testimony of Defendants' witnesses that the 2009 calculations were a mistake. The initial calculations for the 2010 Milestone Statement, performed by John Stude, CPA, of CPX in February 2011,

<sup>&</sup>lt;sup>15</sup>JX 25, at p. 1-2.

<sup>&</sup>lt;sup>16</sup>This argument also is not consistent with other documentary evidence presented at trial.

were done in the same manner as the 2009 calculations.<sup>17</sup> Specifically, Stude included Pumpco operations in the Marcellus Shale. Stude's bottom line was a Milestone Payment of \$3,000,000.

A few days after Stude gave his calculations to Jose Bayardo, then Vice-President and Chief Financial Officer of CPX, Bayardo informed Stude by email:

Our position is that they did not achieve any earn-out milestones for 2010. Last year, because we pulled out the original AWS Marcellus frac fleet (due to their inability to do work [sic] the assets) we generously proposed giving them credit for the first Pumpco fleet that was deployed in [the Marcellus Shale] for the 2009 Milestone Statement, even though the Pumpco fleet had nothing to do with AWS and Jack and Doug did not contribute in any way to the Pumpco deployment. They rejected our proposal, and since they didn't have anything to do with Pumpco they should not receive any credit for any of the Pumpco operations in PA. At best they could argue that they should get credit for the original Pumpco fleet.

It appears to the Court that the final 2010 Milestone Statement calculations obviously were result-oriented. There is no other plausible explanation for the change in methodology. The evidence at trial demonstrated that as of the time of the 2010 Milestone Statement, the relationship among Bayardo, Albert and Henson was contentious.

<sup>&</sup>lt;sup>17</sup>PX 58.

The earn-out calculations were established by the APA. The letter accompanying the 2009 Milestone Statement explicitly states that the 2009 calculations were pursuant to the APA. Whether or not Albert and Henson remained involved in operations is not relevant. The Court finds that the only reason for the CPX change in the 2010 position was to achieve the result of no earn-out.

The Court has determined that it was arbitrary and unreasonable for CPX: to calculate the 2010 Milestone Statement for the specific purpose of concluding that no Milestone Payment was earned; and to include the Pumpco equipment for the 2009 Milestone Statement, but not to include at least one Pumpco fleet in the 2010 calculations.

## How Should the Milestone Payments be Calculated?

The first question is whether the 2010 Milestone Payment calculations should include one Pumpco replacement fleet, or all CPX operations in the Marcellus Shale.

The APA defines "Pressure Pumping and Coiled Tubing Operations" as "the pressure pumping and coiled tubing operations of Sellers." "Sellers" are Titan Wireline Service, Inc. and Appalachian Well Services, Inc. CPX and AWS are defined as "Buyer." The APA recites that Sellers "own certain assets used in the

conduct of the Business," and that Buyer "desires to purchase...such assets."

"Business" is defined as "the pressure pumping services (including but not limited to, cementing and fracturing services), coiled tubing services and e-line operation services, each as conducted, and contemplated to be conducted, by Sellers on the date hereof [October 4, 2008]." At that time, Sellers operated a single fleet.

The Court already has determined that the parties to the APA could not reasonably expect all CPX operations to be managed and supervised by AWS.

Therefore, the Milestone Payment does not have to include all CPX operations.

Section 2.05 of the APA provides that for Pressure Pumping and Coiled Tubing Operations, TWA is entitled to an earn-out of up to \$3 million, if EBITDA for the operations is in excess of \$14 million over a consecutive twelve-month period. The minimum EBITDA threshold for an earn-out and the maximum EBITDA cap subject to an earn-out were to be adjusted based on investment by CPX in "Growth Oriented Capital Expenditures" related to AWS's operations.

In the 2009 Milestone Statement, CPX made its calculations using the net book value ("NBV") of the transferred AWS fleet.<sup>18</sup>

CPX expert Dennis Arnie, CPA, did not use NBV. Rather, Arnie used acquisition cost, and found total 2010 EBITDA to be \$15,770,828. Arnie's net

<sup>&</sup>lt;sup>18</sup>JX 24, at p. 6441.

result was that the 2010 EBITDA was \$217,418, or 1.36%, short of the minimum threshold, which he calculated as \$15,988,246. Thus, Arnie testified that no Milestone Payment was earned.

TWA expert Jeff Litvak used NBV for the fleet. He calculated the threshold to be \$15,598,704, and total 2010 EBITDA to be \$16,446,172. The difference is \$847,468, or 5.4%, over the threshold. Litvak concluded that if all Pumpco EBITDA were included for 2010, the result would be a Milestone Payment of \$3.75 Million. EBITDA from only one Pumpco fleet deployed in the Marcellus Shale would result in an earned Milestone Payment of \$529,668.

The Court finds CPX's use of acquisition value, instead of NBV, to be arbitrary and unreasonable. The only apparent reason for changing the parameters of the 2009 NBV calculation to the 2010 acquisition value calculation was to ensure that no Milestone payment would be earned, regardless of whether or not any Pumpco fleet eventually would be included, as it had for 2009.

## Course of Performance/Dealing or Settlement Discussions?

Throughout the trial, the Court considered whether certain evidence should be admitted for purposes of findings of fact and conclusions of law at the close of the case. The parties disputed certain testimony, and numerous documents, on the grounds that such evidence constituted either inadmissible settlement discussions, or admissible course of performance or course of dealing.

Because this case was not tried before a jury, the Court had the discretion to hear the evidence, and to resolve the evidentiary issues at the close of the evidence. The Court has determined that the disputed evidence is inconclusive.

The Court has made its findings based on the terms of the contract, and on the evidence that was admitted without objection.

# FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING BENCH TRIAL

- (1) The Court finds that removal by CPX of the sole AWS high pressure fleet thwarted the reasonable expectations of all parties to the APA.
- (2) The subsequent exchange of the AWS fleet for a Pumpco fleet was neither arbitrary or unreasonable.
- (3) It was arbitrary and unreasonable for CPX to perform the 2010 Milestone Payment calculations for the specific purpose of concluding that no Milestone Payment was earned.
- (4) It was arbitrary and unreasonable for CPX to include the Pumpco equipment in calculating the 2009 Milestone Statement, in exchange

- for the transferred AWS fleet, and not to include at least one Pumpco fleet in the 2010 calculations.
- (5) CPX's use of acquisition value, instead of net book value, in the 2010 Milestone Statement was arbitrary and unreasonable, and net book value must be used in the Milestone Payment calculations.<sup>19</sup>
- (6) The production of one Pumpco fleet, to substitute for the single AWS fleet transferred out of the Marcellus Shale, must be included in the Milestone Payment calculations.
- (7) The actual Milestone Payment calculations must be performed according to the APA provisions. If the parties cannot agree on these mathematical calculations, the matter must be referred to an independent accountant pursuant to Section 2.05(e) of the APA.
- (8) Defendants' Motion for a Directed Verdict is hereby **DENIED**.

The parties shall confer on a proposed implementing order, to be submitted to the Court by August 15, 2013. If there is not agreement on the form of proposed order, the parties shall submit competing draft orders to the Court.

#### IT IS SO ORDERED.

<sup>&</sup>lt;sup>19</sup>The Court also finds that it is reasonable to calculate the 2010 Milestone Payment after normalizing revenues for February 2010.

Ist Mary M. Johnston

The Honorable Mary M. Johnston