AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

RE: 70 166 00409 09
Vermilion Bay Exploration, Inc.
And
Mark Janik

ADMINISTRATOR: Mary Jara

AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, hereby AWARD as follows:

The request of Claimant Vermilion Bay Exploration, Inc., for a declaratory judgment stating that the Claimant's interpretation of the employment agreement is both legally and factually correct and that Claimant owes the Respondent nothing more is DENIED. The Respondent's counterclaim for payment of severance benefits under the Parties Employment Agreement dated as of February 1, 2007, is GRANTED. The Claimant, Vermilion Bay Exploration, Inc., shall pay to the Respondent, Mark Janik, the sum of $180,000.00 together with interest thereon as set forth in paragraph 10., as well as reasonable attorney's fees in the sum of $47,032.54 and arbitration costs in the amount of $8,758.25.

REASONS FOR AWARD

Background

1. At the time of the events underlying this case, the Claimant, Vermilion Bay Exploration, Inc. ("VBI"), was in the oil and gas exploration business. The Respondent, Mark Janik, was a Reservoir Engineer who began working for VBI in 2007. In connection

with his employment, the Parties[1] executed an Employment Agreement dated as of February 1, 2007 ("the Employment Agreement") which provides, in pertinent part, as follows:

> (3) Term. The "Term" of Employee's employment shall be one (1) year, commencing on the date hereof but shall automatically renew for one (1) year periods unless either Party gives the other notice of an intent to terminate Employee's employment on the next annual anniversary date at least sixty (60) days prior to the annual anniversary day or Employee is sooner terminated as provided in Section 6 of this Agreement; * * *
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> * * *
>
> (6) Termination of Employee's Employment.
>
> (a) Termination. Employee's employment hereunder may be terminated at any time during the Term in accordance with the following provisions:
>
> (i) Death.[2] * * *
>
> (ii) Disability. * * *
>
> (iii) Termination by the Company for Cause. * * *
>
> (iv) Termination by the Company Upon Sale of the Company. * * *
>
> (b) Compensation Upon Termination.
>
> (i) End of Term, Cause, Resignation or Sale of Company. In the event Employee's employment hereunder is terminated: (A) at the end of the Term (taking into account any extensions thereof pursuant to the provisions of Section 3), (B) pursuant to the provisions of Section 6(a)(iii) hereof due to termination of Employee for Cause, (C) by reason of resignation by the Employee, or (D) pursuant to the provisions of Section 6(a) (iv) hereof due to termination of Employee upon a Sale

[1] The Employment Agreement was signed by the Respondent and Cymraec Resources, Inc. as "Employer." The Claimant is the successor to the rights and obligations of Cymraec Resources, Inc., with regard to the Employment Agreement.

[2] The Parties agree that there was no termination for the reasons set forth in Section 6(a) (i) through (iv) of the Employment Agreement. Hence, those provisions are not being quoted.

> of the company; the Company shall have no further obligation to Employee except to pay amounts of accrued but unpaid salary hereunder.
>
> * * *
>
> (iii) Without Cause. If Employee's employment hereunder is terminated by the Company other than pursuant to the provisions of Sections 3 or 6(a), the Company shall have no further obligations to Employee under this Agreement (or otherwise for severance or employment) except that the Company shall pay to Employee an amount equal to any accrued but unpaid salary hereunder and, in addition, his then current annual salary throughout the period of twelve (12) months ("Severance Payment") after termination at the same time as payments are made to employees in accordance with Company's regular payroll practices * * *

The Respondent testified that, when the Employment Agreement was being negotiated, he insisted on a Severance Payment provision such as Section 6(b)(iii) because he was leaving his then-current employer to work for VBI.

2. The primary issue in this case is whether the Respondent abandoned his job, or whether he was terminated without cause. If the Respondent abandoned his job, as the Claimant asserts, he is owed nothing further. If, however, the Respondent was terminated without cause, he is entitled to a Severance Payment of $180,000.00 (his annual salary at the time of his separation) pursuant to Section 6(b)(iii). The Claimant strenuously denies that the Respondent was terminated, contending that Section 6(b)(i) controls and that it has satisfied its sole contractual obligation -- to pay the Respondent any salary that had accrued but not been paid as of his departure. The Claimant initiated this arbitration seeking a declaratory judgment confirming its interpretation -- that it owes the Respondent nothing -- of the Employment Agreement. The Respondent, on the other hand, insists that he was terminated by Michael McGovern, VBI's Non-Executive Chairman, during a June 9, 2009 conversation, and counterclaims for $180,000.00 (twelve months' salary), attorney's fees, arbitration costs and punitive damages.

FACTS

Evidence was presented during a two (2) day Hearing, and the Parties submitted case law for the Arbitrator's consideration. The evidence demonstrated the following:

3. At the time of the events underlying this case, VBI potentially viable prospects had decreased to only two (2), one of which was located in the South Marsh Island area, offshore Iberia Parish, Louisiana and referred to as the "Twin Sister." It was hoped that the Twin Sister would be as successful as neighboring fields being worked by other companies. However, the Twin Sister was a high risk, high expense venture – a "moon shot." During the first week of June of 2009, VBI learned that the Twin Sister was not going to be successful[3] and that most of the money that had been invested in its development was lost. This was dire news for the VBI. At this point, Chairman McGovern, who did not office at VBI and only visited the office perhaps once a week, and who had been brought into the Company, in part, to find growth opportunities, realized that he had to reduce VBI's operating costs, i.e., get rid of personnel. VBI had few employees at the time, including its President, Rick Vazquez[4], who was a geologist; Danny Stephens, who was a petroleum engineer; the Respondent, a reservoir engineer; Landman Chuck Cornish and several administrative employees. After contrasting the skill sets of all employees with VBI's greatly diminished future needs, Chairman McGovern determined that the Respondent, Landman Cornish and one (1) of the administrative staff, Laci Chaubert, were no longer needed. Chairman McGovern decided that Landman Cornish and Ms. Chaubert would be terminated. He also apparently had decided to terminate the Respondent as well until he remembered that the Respondent had an Employment Agreement. On June 9, 2009, Chairman McGovern went to VBI's office, got a copy of the Respondent's Employment Agreement and "read it very carefully." Chairman McGovern noted that the Employment Agreement had a one (1) year term that renewed automatically unless terminated with at least sixty (60) days' notice. He also noted that if the Respondent was terminated without cause, he would be owed twelve months' salary as a Severance Payment. Chairman

[3] It was "wet" – which apparently, when prospecting offshore, is the equivalent of a dry hole.

[4] Both President Vazquez and Engineer Stephens testified but, as they were not present at the June 9th meeting and knew only what Chairman McGovern had told them, their testimony was not very helpful to determining what in fact had occurred. Indeed, both of these witnesses testified that they did not want to be involved in the Respondent's separation – as Chairman McGovern confirmed -- and that they knew virtually nothing about the circumstances leading to his departure, although they understood from Chairman McGovern that he and the Respondent were trying to work something out.

McGovern testified that, after he read the Employment Agreement, his intent to terminate the Respondent changed because he did not want to incur the liability of the Severance Payment.

4. The Parties agree that Chairman McGovern and the Respondent met on June 9, 2008, to discuss the Employment Agreement. According to Chairman McGovern, he advised the Respondent that VBI did not need and could not afford the Respondent's skill sets any longer. Chairman McGovern stated that the Respondent responded that he was entitled to a year's salary as his Severance Payment. Chairman McGovern testified that he then pointed out Section 3 of the Employment Agreement to the Respondent, emphasizing that he would not be entitled to any severance if he worked through the end of the contractual term, and then gave the Respondent a choice: he could either work through the end of the Employment Agreement's term – doing "something" other than working as a reservoir engineer – or agree to "some amount of severance" in order to be able to reenter the job market earlier than the following February. Chairman McGovern suggested that the Respondent go home, read the Employment Agreement and talk to a lawyer, and that the Respondent then call him to see if they could "work this out." Chairman McGovern testified that he did not terminate the Respondent, and thought he was offering the Respondent something better than what he was entitled to under the Employment Agreement. After his meeting with the Respondent, Chairman McGovern told Messrs. Vazquez and Stephens that he and the Respondent had a "positive" meeting and that they were going to "work something out."

5. The Respondent's version of his June 9, 2009, discussion with Chairman McGovern is substantially different. According to the Respondent, Chairman McGovern brought a copy of the Employment Agreement into the meeting and told the Respondent that he was being terminated that day but that he would not pay the $180,000.00 Severance Payment. The Respondent stated that, although he did not remember all of the contractual provisions contained in the Employment Agreement, he specifically remembered the Severance Payment provision because he had negotiated that provision as a condition to leaving his former job to work for VBI. The Respondent testified that Chairman McGovern told him to pack his things and go home, and that he should call Chairman McGovern in the morning so he could tell the Respondent "what you're going to get." According to the

Respondent, he collected his personal items, said goodbye to coworkers, and gave President Vazquez his keys, swipe card and access cards because Chairman McGovern had made it clear during their conversation that the Respondent would no longer be working for VBI. The evidence demonstrated that the Respondent's VBI e-mail and Logix access was terminated on June 9, 2009, along with that of Landman Cornish and Ms. Chaubert, and that the Company notified numerous individuals that "Mark (Janik) is no longer with Vermilion" as early as June 11, 2009.

6. On June 10, 2009, the Respondent e-mailed Chairman McGovern and stated the following:

> Vermilion (you) did in fact terminate my employment without cause, effective yesterday, in which case Vermilion does owe me all salary accrued through 6/9/09 that was not paid, plus 12 months severance payment of my current salary of $180,000.

Chairman responded, by e-mail dated June 10, 2009, as follows:

> Your e-mail stating that you were terminated is troubling and inaccurate. During our conversation, we discussed that the company is attempting to reduce costs and expenses. I suggested that the expense of a reservoir engineer is difficult to justify, given our lack of producing properties and exploration opportunities. You agreed. Then, options regarding your future were discussed. The first option was for you to fulfill your contract and work through Feb. 2010. The other was for us to reach a mutually agreeable arrangement that would allow you to reenter the job market now instead of Feb. 2010. This alternative was solely to assist you. You suggested that you were uncertain about certain provisions in your contract. I encouraged you to go home, read the contract and give me a call. Your response is the following e-mail. Since you were not terminated, I assume that you intend to fulfill your contract and will be at work tomorrow. If you wish to discuss, please give me a call.

Chairman McGovern and the Respondent exchanged several other e-mails, in which they both reiterated their own version of the June 9th meeting. On June 11, 2009, Chairman McGovern sent the Respondent a draft Notice of Intent to Terminate Employment pursuant to Section (3) of the Employment Agreement, which was to be effective as of February 1, 2010. He also stated in his e-mail:

> My intent is to unquestionabl(y) convey that Vermilion remains committed to continue to honor your contract and expects the same from you.

The Respondent e-mailed Chairman McGovern the following day, reiterating his version of what had been discussed during the June 9th meeting and noting,

> Your later attempt to terminate effective on my anniversary date is a sham and very disturbing. I am entitled to one year's severance as provided for in the (Employment Agreement).

By letter dated June 12, 2009, Chairman McGovern mailed the Respondent the Notice of Intent to Terminate Employment pursuant to Section (3) of the Employment Agreement. He also e-mailed the Respondent that his absences on June 11 and 12, 2008, would be recorded as vacation, but that on Monday, June 15, the Respondent needed either to report for work or obtain approval for additional vacation time. Chairman McGovern also told the Respondent,

> Otherwise, you will be in material breach of your contract. Attendance is a condition of employment.

On June 18, 2009, Chairman McGovern sent the Respondent a letter advising that, if the Respondent did not return to work by noon on Friday, June 19, 2009, VBI would deem his action as "job abandonment, your decision to quit." On June 19, 2009, an Employee Termination form was signed, stating as the reason for the Respondent's termination, "Job Abandonment."

CONCLUSIONS

7. Having carefully considered the evidence, the Parties' post-Hearing submissions and the arguments of counsel, the undersigned concludes that the Claimant in fact terminated the Respondent's employment on June 9, 2009. The Respondent understood he had been terminated, and everyone else associated with VBI, including the computer/IT contractor, understood that the Respondent would no longer work for VBI. This is demonstrated by evidence concerning the change of the Respondent's computer password; the Respondent's inability to access his e-mail or Logix accounts; President Vazquez's acceptance of the Respondent's keys and access cards; the e-mails sent to numerous customers and others advising that "Mark Janik is no longer here"; and the Respondent's receipt of an expense form designed for former employees. The Respondent's termination triggered Section 6(b)(iii) of the Employment Agreement. Yet Chairman McGovern's

actions on June 9, 2009, amounted to an attempt to circumvent VBI's contractual obligations. Under the Employment Agreement, VBI had two (2) options when it realized that the Respondent's services were no longer needed and that it could no longer "afford" his skill sets: It could have given him a notice of intent to terminate the Respondent's employment at least sixty (60) days prior to the Employment Agreement's annual anniversary date (February 10) and allowed him to work out the term[5] -- during which, the evidence showed, VBI would have paid him $100,000.00 in salary -- or it could have paid the Respondent the $180,000.00 Severance Payment due under Section 3(b)(iii). Chairman McGovern did neither, however. Instead, he tried to negotiate a lesser amount of severance[6] than was required under the circumstances. Although Chairman McGovern testified that he was trying to help the Respondent, the evidence persuades the undersigned that he was trying to reduce VBI's monetary obligation – at the Respondent's expense. In this Arbitrator's opinion, Chairman McGovern's action amounted to a breach of the Employment Agreement because it deprived the Respondent of his contractual entitlements: notice of intent to terminate or the Severance Payment. To accept the Claimant's interpretation of the Employment Agreement would render it meaningless.

8. The Claimant points out that the Employment Agreement requires, under Section 11(c), that:

> All notices, requests, demands or other communications required or permitted under this Agreement and the transactions contemplated herein shall be in writing * * *

Moreover, the Claimant asserts, the Respondent acknowledged by means of the Handbook Acknowledgement and Retention Bonus Agreement he signed, that all agreements between himself and VBI had to be in writing and signed by both Parties in order to be enforceable. Thus, the Claimant contends, the Respondent was not terminated because there was no written communication from VBI advising that he was, in fact, being terminated. While an

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[5] Inasmuch as there is no dispute that the skill sets of a Reservoir Engineer were not needed, it is doubtful that Chairman McGovern could have found "something" for the Respondent to do that would not constitute a demotion and, possibly, a constructive termination. The Respondent was hired to serve as Vice President of Engineering "with such authority and responsibilities as are customarily associated with such position..." (*See* Section 2 (a) of the Employment Agreement). Chairman McGovern's testimony made clear that the "something" he contends he could have found for the Respondent to do would not satisfy VBI's Section 3 obligations. Moreover, the evidence indicated that, by February 10, 2010, VBI's business had changed so drastically that Chairman McGovern was VBI's only remaining "employee."

[6] The remaining term of the Respondent's employment, had he been retained, would result in approximately $100,000.00 of salary.

employer generally may have the right to rely on these types of provisions, the evidence presented in this matter persuades the undersigned that the Claimant ignored the Employment Agreement – including Section 11(c) – in hopes of negotiating a lower severance for the Respondent than that contractually required by Section 6(b)(iii). Only when VBI realized that the Respondent would continue to insist upon the Severance Payment did it begin sending communications that could be interpreted as the type of written notices called for by the Employment Agreement. By this time, however, it was too late to insist on enforcement of the provisions requiring written communication: VBI already had ignored them in attempting to negotiate a severance lower than that to which the Respondent was entitled. It would be unjust to require the Respondent to comply with a contractual provision that VBI initially ignored for its own benefit.

9. For the above reasons, the undersigned concludes that the Respondent is entitled to be paid the contractual Severance Payment of $180,000.00, with pre-judgment interest, as well as to recover reasonable attorney's fees and arbitration costs incurred herein. The Respondent also has requested punitive damages based on the Claimant's alleged breach of fiduciary duty. Texas law does not recognize a duty of good faith and fair dealing in the employment context. ***City of Midland v. O'Bryant***, 18 S.W.3rd 209 (Tex. 2000). The undersigned has considered the case law submitted by the Parties pertinent to the Respondent's request for punitive damages and, based on the evidence, concludes that Parties' relationship did not rise to the level necessary to give rise to a fiduciary duty. Accordingly, the Respondent's request for an award of punitive damages must be denied.

10. In light of the foregoing, the claim of Claimant, Vermilion Bay Exploration, Inc., is denied; the counterclaim of Respondent Mark Janik is granted. The Respondent, Mark Janik, shall have and recover of and from Claimant, Vermilion Bay Exploration, Inc.[7], the following:

1. The contractual Severance Payment in the amount of $180,000.00, together with pre-judgment interest thereon at the legal rate from July 8, 2009, through the date of this Award;

2. Reasonable attorney's fees in the amount of $47,032.54;

[7] The Parties stipulated that Vermilion Bay Exploration, Inc. and Vermilion Resources, Inc. will be jointly and severally liable for any Award in this case.

3. The sum of $8,758.25 as reimbursement for arbitration costs incurred; and

4. Post-judgment interest on the above sums at the legal rate from the date of this Award until paid.

11. The administrative fees and expenses of the American Arbitration Association totaling $9,575.00 and the compensation and expenses of the arbitrator totaling $8,686.50, shall be borne by Claimant, Vermilion Bay Exploration, Inc. Therefore, Claimant shall reimburse Respondent, Mark Janik, the sum of $8,768.25, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Respondent, upon demonstration by the Respondent to the Claimant that these incurred costs have been paid.

12. This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

Signed: _____ Dated: April 13, 2010
Lynne M. Gomez