Trey A. Monsour
Texas State Bar No. 14277200
Ben J. Gerber
Texas State Bar No. 24087578
K&L Gates LLP
1717 Main Street, Suite 2800
Dallas, TX 75201
Telephone: (214) 939-5500
Facsimile: (214) 939-5849

COUNSEL FOR
MARKLEY BOSTON, LLC

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	Chapter 11
	§	
FIBERTOWER NETWORK SERVICES CORP., *et al.*	§	Case No. 12-44027-DML-11
	§	
	§	(Jointly Administered)
Debtors.	§	
	§	

MOTION TO DEEM TIMELY FILED
PROOF OF CLAIM FOR REJECTION DAMAGES

A HEARING WILL BE CONDUCTED ON THIS MATTER ON WEDNESDAY, JUNE 18, 2014 AT 12:00 P.M. (NOON) PREVAILING CENTRAL TIME IN COURTROOM 128, U.S. COURTHOUSE, 501 W. 10TH STREET, FORT WORTH, TX 76102.

IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

Markley Boston, LLC ("Markley") moves this Court to deem its proof of claim for rejection damages (the "Claim"), attached hereto as Exhibit A, as timely filed (the "Motion"). In support of the Motion, Markley respectfully states as follows:

I. JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding within the meaning of 11 U.S.C. § 157(b).

II. BACKGROUND

2. FiberTower Network Services Corp. ("FiberTower") and its affiliated debtors (collectively with FiberTower, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Court on July 17, 2012.

3. Markley is an affiliate of The Markley Group LLC ("Markley Group"), a New England multi-tenant telecommunications and data center operator that leases physical space and sells bandwidth for connecting to national and international network providers.

4. FiberTower entered into a Data Center/Technology Lease (the "Lease Agreement," attached hereto as Exhibit B) with Markley on December 31, 2004, in which Markley provided operating space and network connectivity for FiberTower's backhaul and spectrum services.[1]

III. DEFECTIVE NOTICE OF BANKRUPTCY

5. As set forth in their motion establishing notice procedures, Debtors were permitted to notify creditors by e-mail *"[t]o the extent that e-mail addresses are submitted or are obtainable for parties filing a notice of appearance and request for service of papers."* [Docket No. 10, ¶ 17 (emphasis added).] Otherwise, Debtors agreed to send notice via United States mail or other appropriate service. [*Id.*]

[1] FiberTower paid rent under the Lease Agreement through April 2013, eight (8) months after filing its bankruptcy petition. Both pre- and post-filing, FiberTower would pay rent into a lock box account. Receipt of payment would be posted in Markley's account by the lender. Markley never received direct payment from FiberTower. Markley asserts a rejection damages claim of $70,869.48 under the Lease Agreement.

6. The Lease Agreement required that all notices and other communications given by either party be in writing and sent by United States certified or registered mail, postage prepaid, return receipt requested; delivered by overnight courier; or delivered personally. Debtors had the address of Markley's Boston office and Markley Group's Los Angeles office, individual contacts at each office, and the telephone and facsimile numbers for its Los Angeles office. There were no e-mail addresses in the Lease Agreement.

7. On July 18, 2012, Debtors sent notice of bankruptcy (the "Notice") to Markley Group's e-mail address, info@markleygroup.com, which they found on Markley Group's website under its "Contact Us" page. Debtors did not bother to contact the individuals they knew should receive notice under the Lease Agreement to obtain their e-mail addresses.

8. The e-mail address on Markley Group's website is primarily used to field inquiries from potential customers interested in Markley Group's services. Markley Group's Executive Vice President in charge of sales and marketing monitors the address's inbox and forwards sales inquiries to Markley Group's salespersons.

9. Debtors' Notice did not state specifically that Markley had a potential claim or include any filing deadlines; instead, it provided a link to a website where interested parties could find information on Debtors' bankruptcy as it became available. The sales personnel did not know that the Notice was something that required action. By the time the Notice was received by the legal department, it was too late.

IV. DEFECTIVE NOTICE OF BAR DATE

10. On April 5, 2013, Debtors filed a 392-page motion seeking to reject hundreds of unspecified executory contracts and leases and to abandon certain personal

property (the "Rejection Motion"). [Docket No. 704.] The Lease Agreement was among those listed in the Rejection Motion. [*Id.*] This was just one of several motions like this filed by Debtors. The Rejection Motion was sent to a lock box address in Hicksville, New York. On page 202 of the Rejection Motion, in a proposed form of order approving the Rejection Motion, was a single paragraph fixing the bar date at thirty (30) days from entry of the order approving the Rejection Motion.

11. On April 30, 2013, the Bankruptcy Court entered the order approving the Rejection Motion (the "Rejection Order"). [Docket No. 754.] In the Rejection Order, the bar date for rejection damages claims was fixed at May 30, 2013 (the "Bar Date"). Other than entry of the Rejection Order on the Bankruptcy Court's docket, no additional notice of the Bar Date was sent to Markley.

12. On January 27, 2014, the Bankruptcy Court confirmed the Debtors' Chapter 11 Plan (the "Plan") [Docket No. 1067.] The Plan affirmed the Bar Date. The Plan was mailed to Atlanta, Georgia, a different address than the address used for notice of the Rejection Motion.

13. Almost a year into the bankruptcy and prior to the Bar Date, Markley's controller noticed the gap in FiberTower's rent revenue. Upon further investigation, the controller learned that FiberTower had turned off its equipment in that leased space. The controller brought it to the attention of Markley's legal department. One of the younger attorneys in the department made several attempts through correspondence to collect the past due rent.

14. Not long thereafter, Markley turned the matter over to outside counsel. The Bar Date was brought to the attention of Markley by outside counsel. At no time was

Markey ever told or made aware of the Bar Date prior to then or served with any official notification.

V. RELIEF REQUESTED

15. Markley respectfully requests that the Bankruptcy Court permit its Claim to qualify as timely on the basis of excusable neglect. Markley's failure to file its Claim on or before the Bar Date was a result of excusable neglect because:

a. The e-mail address used in the Notice was not a proper e-mail address for Markley but, rather, a general marketing e-mail address obtained from the Internet;

b. The Rejection Motion containing a hint of a proposed bar date on page 202 of 392 pages was sent to a lock box address rather than that set forth in the parties' Lease Agreement; and

c. The Plan affirming the Bar Date was sent to yet another improper address in Atlanta, Georgia.

Of all the addresses used by Debtors, not once were the addresses specified for notice purposes in the Lease Agreement used.

VI. ARGUMENT AND AUTHORITY

A. Excusable Neglect: The *Pioneer* Decision

16. A creditor may move a court to permit an action after the expiration of a period within which it was to be done if the failure was due to excusable neglect. FED. R. BANKR. P. 9006(b)(1). Under this authority, a court may permit the filing of proofs of claim after the passage of a bar date. *Pioneer Inv. Servs. Co. v. Brunswick Ass'n Ltd. P'ship*, 507 U.S. 380, 394 (1993). In *Pioneer*, the Supreme Court held that "neglect"

"encompasses both simple, faultless omission to act and, more commonly, omissions caused by carelessness" and concluded that "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388. The Supreme Court recognized that the real question entrusted to the bankruptcy courts is whether the neglect of the bar date is excusable. *Id.*

17. The determination as to what types of neglect are considered excusable is essentially an equitable decision that requires a court to explore the following factors: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Id.* at 395. Considering those factors, courts often focus their evaluation on the reason for the delay, including whether the delay was in control of the movant. *See In re Enron Corp.*, 419 F.3d 115, 122 (2d Cir. 2005).

B. Application of *Pioneer* Factors to Markley's Claim

18. Upon examination of the destination, substance, and consequences of Debtors' Notice, the *Pioneer* factors weigh in favor of the Bankruptcy Court permitting the Claim as timely filed. Markley's reasons for filing its untimely Claim are understandable because every attempt to provide notice went to an unforeseeable and improper address. Considering that the Plan has been confirmed, the length of delay will not significantly impact the present status of judicial proceedings. The Debtors would not be prejudiced by the Court permitting the Claim because the Plan has established Markley's proper class. Finally, Markley has at all times acted in good faith.

19. Markley's Claim, if allowed, can easily be resolved without further necessitating the involvement of the Bankruptcy Court. The Fifth Circuit has previously found no evidence of delay where a confirmed plan existed at the time of creditor's motion and the debtor was a partial cause of the creditor's eight-month late claim. *Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg., Inc.)*, 62 F.3d 730, 739 (5th Cir. 1995).

20. There is no need to reopen the plan confirmation process to allow Markley's Claim. Markley has been a known creditor since Debtors' filing and it can become part of Class 1E, the Plan's class for general unsecured creditors. Further, Markley's delay is in part the consequence of the Debtors ignoring the notice provision and contact information available in the Lease Agreement. Thus, should the Bankruptcy Court deem the Claim timely filed, the proceedings in this case will continue without any further delay.

21. Permitting Markley's Claim will not prejudice the Debtors because their Plan has accounted for Markley's creditor class. In determining whether prejudice may occur, bankruptcy courts have identified considerations such as the size of the late claim in relation to the estate and the disruptive effect that the filing would have on the economic model upon which the plan was created. *In re Keene Corp.*, 188 B.R. 903, 910 (Bankr. S.D.N.Y. 1995) (citing *In re Eagle Bus Mfg.*, 62 F.3d 730, 737–38 (5th Cir. 1995)). Markley recognizes that permitting the Claim may allow similar creditors to file untimely claims, but any harm done would only occur among creditors, which is not a consideration of the Bankruptcy Court's prejudice evaluation. *In re Eagle Bus Mfg.*, 62 F.3d at 738. Because Markley's Claim can be placed into Class 1E, receiving its pro rata share along with the other general unsecured creditors, the Claim will not prejudice Debtors.

WHEREFORE, Markley Boston, LLC respectfully requests that its Claim be deemed timely filed, and requests such other and further relief to which Markley may be justly entitled.

Date: May 20, 2014

Respectfully submitted,

By: */s/ Trey A. Monsour*
Trey A. Monsour
Texas Bar No. 14277200
Ben J. Gerber
Texas Bar No. 24087578

K&L GATES LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
(214) 939-5849 (Telecopier)

ATTORNEYS FOR
MARKLEY BOSTON, LLC

Certificate of Conference

I hereby certify that I contacted counsel for FiberTower and he was unaware of the facts and urged the filing of the motion.

/s/ Trey A. Monsour
Trey A. Monsour

CERTIFICATE OF SERVICE

I certify that on May 20, 2014, a true and correct copy of the foregoing document was served via email through the Bankruptcy Court's Electronic Case Filing System on those parties that have consented to such service, including the Debtors. Furthermore, the foregoing document has been served on the parties appearing on the Limited Service List maintained in these chapter 11 cases via first class U.S. mail, postage prepaid and, where possible, via electronic mail.

/s/ Trey A. Monsour
Trey A. Monsour