

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

In re:	*	Case No. 15-35615
	*	
Raam Global Energy, Company, et al.	*	Chapter 11
	*	
Debtors	*	Jointly Administered
	*	

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**LATE-FILED OBJECTION OF WESTERNGECO, L.L.C.  
TO SUPPLEMENTAL NOTICE OF POSSIBLE ASSUMPTION AND ASSIGNMENT OF  
EXECUTORY CONTRACTS AND UNEXPIRED LEASES [Dkt. No. 391], AND  
MOTION TO AUTHORIZE AND APPROVE (A) STALKING  
HORSE PURCHASE AGREEMENT, (B) SALE OF SUBSTANTIALLY ALL ASSETS  
FREE AND CLEAR OF CLAIMS, LIENS, ENCUMBRANCES AND OTHER  
INTERESTS, (C) ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS  
AND UNEXPIRED LEASES, (D) BIDDING PROCEDURES, (E) PROCEDURES FOR  
DETERMINING CURE AMOUNTS FOR EXECUTORY CONTRACTS AND  
UNEXPIRED LEASES, AND (F) RELATED RELIEF [Dkt. No. 90], AND NOTICE OF  
WESTERNGECO, L.L.C.'S INTENTION TO SEEK TO VACATE ORDERS  
APPROVING SALE AND ASSIGNMENT OF ITS  
MASTER LICENSE AGREEMENT AND LICENSED SEISMIC DATA**

TO THE HONORABLE MARVIN ISGUR, UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, WesternGeco, L.L.C. ("WesternGeco"), a party in interest herein, and files its Late-Filed Objection to the Supplemental Notice of Possible Assumption and Assignment of Executory Contracts and Leases (the "Supplemental Notice") [Dkt. No. 391] and the Motion to Authorize And Approve (A) Stalking Horse Purchase Agreement, (B) Sale Of Substantially All Assets Free And Clear Of Claims, Liens, Encumbrances And Other Interests, (C) Assumption And Assignment Of Executory Contracts And Unexpired Leases, (D) Bidding Procedures, (E) Procedures For Determining Cure Amounts For Executory Contracts And Unexpired Leases, And (F) Related Relief (the "Sale Motion") [Dkt. No. 90] filed by the Debtors, and hereby gives notice of its intention to seek to vacate the Orders approving the sale and assignment of WesternGeco's

Master License Agreement and licensed seismic data [Dkt. Nos. 180 and 377], and shows as follows:

**I. SUMMARY OF OBJECTION**

WesternGeco licensed a substantial quantity of valuable and copyright protected seismic data to one or more of the Debtors pursuant to a Master License Agreement For Multiclient Seismic Data (“Master License Agreement”). While the Debtors’ bankruptcy proceedings were initiated on October 26, 2015, and the Sale Motion was filed on November 6, 2015 in which it was proposed, among other things, that substantially all of the Debtors’ assets would be sold free and clear of all claims, encumbrances, liens and other interests, including the Debtors’ seismic data, and expedited procedures were proposed for the assumption and assignment of executory contracts and unexpired leases, including the Debtors’ licenses of seismic data, as well as the filing of objections thereto, the Debtors failed to place WesternGeco on their mailing matrix or provide any other notice thereof, or even of the filing of their bankruptcy proceedings, to WesternGeco. Thus, WesternGeco was deprived of the right and ability to participate in the Debtors’ bankruptcy proceedings and, among other things, to file objections to the Sale Motion, proposed bid procedures, including the expedited procedures for objecting to the proposed assumption and assignment of its Master License Agreement and licensed seismic data, and the Debtors’ Plan. Rather, the first written notice received by WesternGeco that the Debtors proposed to assume and assign its Master License Agreement and the seismic data it had licensed to the Debtors was the Supplemental Notice dated January 22, 2016 sent by the Debtors to WesternGeco by U.S. Mail, and which was received at the earliest by WesternGeco late in the afternoon on January 27, 2016 at its mail facility and not processed and actually delivered to anyone to be read and analyzed until the morning of January 28, 2016, after the deadline for filing objections to the Supplemental

Notice and the assumption and assignment of WesternGeco's Master License Agreement and seismic data had already expired. As a result, WesternGeco was again deprived of the right to assert a timely objection to the Supplemental Notice, the Sale Motion and the assumption and assignment of its Master License Agreement and seismic data to any third party.

If provided with proper notice, WesternGeco would have objected and hereby asserts a late-filed objection to the Supplemental Notice and the Sale Motion on the basis that WesternGeco's Master License Agreement is a non-assignable executory contract under Bankruptcy Code §365 (c)(1)(A) because, among other things, "applicable law," i.e., the United States Copyright Act, excuses a party, other than the Debtors, to such contract or lease from accepting performance from or rendering performance to an entity other than the Debtor, and such party (WesternGeco) does not consent to the assignment. Rather, WesternGeco is entitled to termination of the License Agreements under Bankruptcy Code §365(e)(1). As a result, WesternGeco gives notice of its intention to seek to vacate the Orders approving the sale and assignment of WesternGeco's Master License Agreement and licensed seismic data, and of its intention to seek an order of the Court terminating the automatic stay for the purpose of terminating the Master License Agreement.

## **II. BACKGROUND**

1. WesternGeco is a geophysical services company that is in the business, *inter alia*, of licensing comprehensive worldwide reservoir imaging, monitoring, and development services, including but not limited to 2D, 3D and 4D (time-lapse) seismic surveys and multicomponent and electromagnetic surveys, to clients for the purpose of providing them with accurate measurements of subsurface geology for potential oil and gas exploration and/or production and other uses.

2. WesternGeco employs geophysical survey crews and has extensive data processing capabilities, as well as a substantial Multiclient data library, and uses sophisticated techniques and cutting edge technology to investigate the Earth's subterranean structure to acquire and interpret seismic data, which permits the estimation of the Earth's composition.

3. When used in gas and oil exploration, seismic data can reveal pockets of lower density material and their location, which may be indicative of reservoirs containing oil or gas. Seismic data assists WesternGeco's clients in deciding where or where not to spend millions of dollars in drilling operations, and can significantly decrease the risk of drilling a non-producing well.

4. Seismic surveys can be conducted under contract to a specific customer, wherein the customer defined the project location and technical specifications. For these projects, the customer holds all ownership rights and has exclusive use of the survey data. Alternatively, under the Multiclient business model, WesternGeco makes a substantial investment in designing, acquiring, processing and otherwise creating and marketing its own seismic data ("WG-owned seismic data"). The WG-owned seismic data is extremely valuable and proprietary in nature. In some cases due to environmental restrictions, it may not be possible for WesternGeco or others to reacquire the data which makes it even more valuable.

5. WesternGeco earns revenue by granting non-exclusive access to WG-owned seismic data to multiple customers under restrictive license agreements which prohibit sale or assignment of the licenses and data and limit its use, disclosure, and transferability. These license agreements allow use of the data only by the customer's employees and impose broad restrictions against use, disclosure, sale and transfer of the data by or to third parties. In fact, even if a

customer has licensed WG-owned seismic data but ownership or control of the customer changes, the license agreement terminates unless WesternGeco agrees to a transfer fee or other arrangement. These restrictive license agreements are critical in protecting the substantial investment made by WesternGeco in creating the data and in preserving WesternGeco's rights under United States copyright law. The Multiclient business model relies on WesternGeco's ability to control the use, disclosure, and transferability of the WG-owned seismic data and the failure to uphold these rights will have a disastrous effect on WesternGeco's Multiclient business.

**A. The Master License Agreement**

6. By Master License Agreement dated April 15, 2003, a copy of which is attached as Exhibit "1", WesternGeco licensed to the Debtors' predecessor in interest, Century Exploration Company ("Century"), on a non-exclusive basis certain seismic data and information (the "Seismic Data") as from time to time was ordered by Century pursuant to Supplemental Agreements issued in accordance with the terms and conditions of the Master License Agreement.

7. The licensed Seismic Data ordered by Century under the Master License Agreement included Seismic Data relating to the geographic areas identified on Exhibit "2" attached hereto.

8. Under the Master License Agreement, it was agreed that Seismic Data from time to time ordered by Century, and now the Debtors, would be licensed by WesternGeco to Century on a non-exclusive basis, in accordance with the terms and conditions contained in the Master License Agreement. *See*, Master License Agreement, p. 1, ¶1, and p. 5, ¶ 2 (B).

9. Among other things, it was agreed in the Master License Agreement that that the Seismic Data provided to Century, and now the Debtors, contains proprietary information and

trade secrets of WesternGeco that are protected by international and United States trade secret and copyright laws, and that title to and ownership rights in such data shall at all times remain with WesternGeco. *See*, Master License Agreement, p. 4, ¶2(A).

10. It was further agreed in the Master License Agreement that Century, and now the Debtors, would utilize the Seismic Data in accordance with the terms of the Master License Agreement, for internal purposes only, and that Century, and now the Debtors, would not disclose or transfer the data and information to third parties except as provided in the Master License Agreement. *See*, Master License Agreement, pp. 4, ¶2(A), and 5, ¶4(A).

11. In particular, the Master License Agreement authorizes Century, now the Debtors, to “disclose”<sup>1</sup> the Seismic Data under certain circumstances to “Related Entities” and “Licensee’s Consultants” without Century and now the Debtors first obtaining the written consent of WesternGeco. *See*, Master License Agreement, pp. 4- 5, ¶¶ 4(A)(i) – (iii). However, the Master License Agreement prohibits Century and the Debtors from “transferring” the data to “Acquirers,” “Partners” and other “Third Parties” without WesternGeco being provided advance written notice of the proposed transaction, Century and now the Debtors obtaining advance written consent from WesternGeco, and Century, and now the Debtors, complying with the other terms and conditions of the Master License Agreement regarding the disclosure or transfer of the data. *See*, Master License Agreement, pp. 6-7, ¶¶ 4(A)(iv) – (vii).

12. In addition, the Master License Agreement contains a number of other obligations

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<sup>1</sup> The term “Disclose” is broadly defined as meaning “to display or otherwise show the Data for short periods of time, in environments whereby others are not able to make or remove copies, transcriptions, summaries or reproductions of the Data of any type, or otherwise acquire knowledge or information from the Data comparable to having a copy of the Data.” “Transfer” is also broadly defined as meaning “the sale, assignment, lease, license, sublicense, transfer, exchange, trade, publication, encumbrance, or other disposition of the Data.” **Error! Main Document Only.***See*, Master License Agreement, pp. 3-4, ¶¶ 1(E) and (S).

on the part of Century and the Debtors regarding its use, disclosure or transfer of the licensed Seismic Data and information, including but not limited to: (a) advising third parties to whom the data and information is disclosed, in writing, of the restrictions regarding confidentiality and use of the data; (b) including a notice on each copy of the data and information that the data and information, among other things, is a trade secret of WesternGeco and protected by copyright; and (c) returning to WesternGeco all data and information derived from the original seismic survey upon expiration or termination of the Master License Agreement. *See*, Master License Agreement, p. 7, ¶¶ 4(B) and (C).

13. Paragraph 7(A)(i) of the Master License Agreement provides that:

“In the event Licensee breaches any condition or provision of this License Agreement relating to confidentiality or restrictions on the use, Disclosure or Transfer of the Data, . . . this License Agreement shall automatically terminate. . .”.

Further, paragraph 7(A)(iv) provides:

“In the event Licensee should commit an act of bankruptcy, . . .or should proceedings be commenced against or by Licensee under any bankruptcy, insolvency or similar statute, the License Agreement may be terminated at any time by WesternGeco.”

## **B. The Debtors’ Bankruptcy Case**

14. October 26, 2015 (the “Petition Date”), each of the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the “Court”).

15. By Order dated October 27, 2015, [Dkt. No. 22], the Court granted the Motion for Joint Administration filed by the Debtors [Dkt No. 6] and the Debtors’ individual bankruptcy proceedings were ordered to be jointly administered under Case no. 15-35615.

16. On November 6, 2015, the Debtors filed their Sale Motion [Dkt. No. 90].

17. In the Sale Motion, the Debtors sought, among other things, entry of an order (the “Sale Order”): (a) authorizing the sale of substantially all of the Debtors’ assets, including the Debtors’ seismic data, free and clear of all claims, encumbrances, liens, and interests; (b) authorizing the assumption and assignment of executory contracts and unexpired leases (the “Executory Contracts”) designated by the Debtors and, in the future, listed on any Assumption Notice issued by the Debtors; (c) approving the Debtors’ proposed Bid Procedures; (d) approving the form of notices and the notice and objection procedures contemplated in the Sale Motion; and (e) setting a date for the hearing to approve the Sale Motion, Bid Procedures, Notices, and proposed transactions (the “Transactions”).

18. Included in the Sale Motion was a provision that sought to permit the Debtors, at any time in the future, to add additional Executory Contracts that the Debtors desired to assume and assign to the list of Executory Contracts to be included in the proposed Transactions by filing and serving, by U.S. Mail upon the counter-parties to such Executory Contracts, an Assumption Notice (the “Assumption Notice”), which reduced the normal notice and objection requirements from 21 days to five calendar days, and further provided, among other things, that any person failing to timely object to the cure amounts listed on the Assumption Notice or claiming to have any property or right that cannot be transferred, sold, assumed or assigned would be forever barred from objecting to the cure amount or to the transfer, sale, assumption, and/or assignment of the property and rights to be sold, assumed and/or assigned.

19. On December 2, 2015, the Court entered an Order (the “Sale and Bid Procedures Order”) [Dkt No. 180] granting certain of the relief sought in the Sale Motion, including, among other things, approving the Bid Procedures and specifically the procedures for the assumption and



assignment of Executory Contracts (the “Assumption and Assignment Procedures”), and setting a date for the sale hearing.

20. On December 22, 2015, the Court entered an Order approving the Debtors’ Disclosure Statement [Dkt. No. 271] and, on January 19, 2016, the Court entered an Order confirming the Debtors’ Second Amended Plan [Dkt. No. 376].

21. Further, on January 19, 2016, the Court entered an Order [Dkt No. 377] (the “Final Sale Order”) granting final approval of the sale of substantially all of the Debtors’ assets.

22. At no time during the pendency of the Debtors’ bankruptcy proceedings, until January 26, 2016 when a representative of WesternGeco received an email that referred to Century being in bankruptcy but stated nothing about the Debtors attempting to assign WesternGeco’s Seismic Data was WesternGeco placed on the Debtors’ mailing matrix or otherwise provided notice of the Debtors’ bankruptcy proceedings. Thus, WesternGeco was deprived of the right and ability to assert objections to the Debtors’ proceedings, including but not limited to the Sale Motion, proposed Sale Order, Bid Procedures, Assumption Notice, other forms of Notices, the Sale and Bid Procedures Order, the Assumption and Assignment Procedures, the Disclosure Statement, the Debtors’ Plan, and the Transactions in general. This was so even though the Sale Motion filed back on November 6, 2015, by its terms, contemplated the sale of substantially all of the Debtors’ assets, and specifically including the Debtors’ seismic data.

23. On January 22, 2016, the Debtors filed a Supplemental Notice of Possible Assumption and Assignment of Executory Contracts and Unexpired Leases (the “Supplemental Assumption Notice”) [Dkt No. 391]. In the Supplemental Assumption Notice, the Debtors for the first time gave notice of their intention to assume and assign to the acquirer of their assets certain

Executory Contracts listed on Exhibit “A” attached to the Supplemental Assumption Notice. Included among the additional Executory Contracts sought to be assumed and assigned by the Debtors were WesternGeco’s Master License Agreement and all of the Seismic Data licensed by WesternGeco to Century, and now the Debtors. In addition, the Supplemental Assumption Notice gave counter-parties to the Executory Contracts sought to be assumed and assigned, including WesternGeco, until January 27, 2016 to file any objections thereto.

24. A Certificate of Service filed by the Debtors on January 26, 2016 [Dkt. No. 396] represents that a copy of the Supplemental Assumption Notice was mailed to WesternGeco via U.S. first class Mail on January 22, 2016. Nevertheless, WesternGeco did not receive the Supplemental Assumption Notice, at the earliest, until late in the afternoon on January 27, 2016 at its mail facility and the Supplemental Assumption Notice received by WesternGeco was not processed and actually delivered to anyone in a position to read, analyze and recognize the significance of it until the morning of January 28, 2016, after the deadline for filing objections to the Supplemental Notice and the assumption and assignment of WesternGeco’s Master License Agreement and Seismic Data had already expired. As a result, in addition to being deprived of the right and ability to participate in the Debtors’ bankruptcy proceedings and to file appropriate objections to the various motions filed therein due to the Debtors’ failure to give it any written notice thereof, WesternGeco was deprived of the right and ability to assert a timely objection to the Supplemental Notice and the assumption and assignment of its Master License Agreement and Seismic Data to the acquirer of the Debtors’ assets.

25. In light of the foregoing, WesternGeco has been substantially and seriously prejudiced and deprived of due process due to the failure of the Debtors to provide it with timely

and appropriate notice of the bankruptcy proceedings and the proposed assumption and assignment of its Master License Agreement and licensed Seismic Data, and as a result, WesternGeco has been forced to file this Late-Filed Objection. In addition, in order to protect its rights and interests, WesternGeco gives notice of its intention, as soon as is reasonably practicable, to seek to vacate the Orders approving the sale and assignment of WesternGeco's Master License Agreement and licensed Seismic Data, and of its intention to seek an order of the Court terminating the automatic stay for the purpose of terminating the Master License Agreement.

**III. BASIS OF WESTERNGECO'S OBJECTION TO ASSUMPTION AND ASSIGNMENT OF ITS MASTER LICENSE AGREEMENT AND SEISMIC DATA**

**A. Assumption and Assignment of the License Agreements is Prohibited by Bankruptcy Code §365(c)(1)**

26. While Bankruptcy Code § 365(a) generally gives the trustee, subject to court approval, the right to assume (or reject) executory contracts, and Bankruptcy Code § 365(f) generally gives a trustee the power to assign executory contracts, Bankruptcy Code § 365(c)(1)(A) provides an exception to both of those grants of authority.<sup>2</sup> Bankruptcy Code § 365 (c)(1)(A) states that a trustee **may not assume or assign** an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if: (a) “applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . .”, and (b) “such party does not consent to such assumption or assignment . . .”.

27. The term “executory contract” is not defined in the Bankruptcy Code; however, the

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<sup>2</sup> Both section 365(a) and 365(f) which authorize assumption and assignment respectively are expressly subject to the exception contained in Bankruptcy Code § 365(c). *See also In re Patient Education Media, Inc.*, 210 B.R. 237, 241 (Bkrcty S.D.N.Y. 6/30/97).

courts generally use what has been referred to as the Countryman Test. Under the Countryman Test, a contract is considered executory if the “obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other.” *In re Sunterra Corporation*, 361 F. 3d 257, 264 (4<sup>th</sup> Cir. 3/18/04).

28. The Master License Agreement between WesternGeco and the Debtors is an executory contract because, among other things, the Debtors have continuing confidentiality obligations to WesternGeco and restrictions upon their use of the licensed Seismic Data under the Master License Agreement while, at the same time, WesternGeco has a continuing obligation to allow the Debtors to use the data, to provide the Debtors with original magnetic media for the seismic data under delineated circumstances, and to defend any legal proceedings brought against it or the Debtors claiming infringement of a patent by WesternGeco in providing the licensed Seismic Data to the Debtors. Such continuing mutual obligations contained in a licensing agreement have been generally found by the courts to be sufficient to meet the definition of an executory contract under Bankruptcy Code §365. *See, e.g., In re Aerobox Composite Structures, LLC*, 373 B.R. 135 (D.N.M. 7/27/07)(patent and technology license agreement found executory based primarily on continuing obligations of both parties to maintain confidentiality); *In re Chapin Revenue Cycle Management, LLC.*, 343 B.R. 728 (Bkrcty. M.D.Fla. 3/1/06)(computer software licensing agreement held to be executory contract where the licensor had obligation to allow continued use by debtor and debtor had obligation to maintain confidentiality of software). *See also In re Sunterra Corporation*, 361 F. 3d 257 (4<sup>th</sup> Cir. 3/18/04)(computer software licensing agreement held executory); *In re Superior Toy & Mfg. Co.*, 78 F. 3d 1169 (7<sup>th</sup> Cir.

3/7/96)(trademark license found to be executory contract).

**B. Copyright Law Provides “Applicable Law” under Bankruptcy Code §365(c)(1)**

29. The “applicable law” that excuses WesternGeco from accepting performance of the Master License Agreement from or rendering performance to an entity other than the Debtors is United States copyright law. The Copyright Act provides protection to the authors of “original works of authorship” fixed in “any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated,” including but not limited to both published and non-published literary, pictorial, graphic, artistic, audiovisual, sound recording, architectural, and certain other intellectual works. 17 U.S.C. §102. It also applies to and protects compilations and derivative works. 17 U.S.C. §103.

30. “Literary works” within the meaning of the Copyright Act are “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.” 17 U.S.C. §101. “Pictorial, graphic, and sculptural works” to which the Act applies include “two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. *Id.* A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. *Id.*

31. Although materials to which the Copyright Act is applicable may be registered in the Copyright Office, registration is not required in order to obtain the protections of the Copyright

Act, and copyright is secured automatically when the work is “created.” 17 U.S.C. §§302, 408. Copyright protection and “ownership” of the copyright vests in the author of the work. 17 U.S.C. §201.

32. The Seismic Data licensed on a non-exclusive basis by WesternGeco to the Debtors under the Master License Agreement is an original work of authorship by WesternGeco that is, in part, expressed in words, numbers, or other verbal or numerical symbols or indicia, such as books, periodicals, manuscripts, film, tapes, or disks, and, in part, is in the form of pictures, graphics, charts, diagrams, photographs and prints. The Seismic Data is in essence the pictorial and graphic results of a sound recording obtained by hydrophone which is manipulated, using sophisticated state of the art and proprietary software, to obtain a one of a kind interpretation and analysis of the recording. Further, the Seismic Data is in large part formed by collecting and assembling data that is selected, coordinated, or arranged in such a way, using WesternGeco’s judgment, that the resulting work as a whole constitutes an original work of authorship. Thus, the Seismic Data is clearly covered and protected by the Copyright Act. *See, e.g., Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (3/27/91). *See also, Rockford Map Publishers, Inc. v. Directory Services Co. of Colorado, Inc.*, 768 F.2d 145 (7<sup>th</sup> Cir. 7/15/85), *cert. den.*, 474 U.S. 1061 (1/13/86)(catalog of names and addresses, logarithms, and maps is copyrightable); *Health Grades, Inc. v. Robert Wood Johnson University Hospital, Inc.*, 634 F. Supp. 2d 1226 (D.Colo. 6/19/09)(healthcare ratings in chart form of various healthcare providers is copyrightable); *Marshall & Swift v. BS & A Software*, 871 F.Supp. 952 (W.D.Mich. 6/9/94)(cost tables in assessor’s manuals are copyrightable); *Tandy Corporation v. Personal Micro Computers, Inc.*, 524 F. Supp. 171 (N.D.Calif. 8/31/81)(computer programs constitute an original work of

authorship subject to copyright).

33. Under Section 106 of the Copyright Act, WesternGeco, as owner of the copyright, generally has the exclusive right to do and to authorize others to do the following:

- a) to reproduce the copyrighted work in copies or phonorecords;
- b) to prepare derivative works based upon the copyrighted work;
- c) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- d) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- e) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- f) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. §1061.

34. Further, the Copyright Act specifies that ownership of a copyright “may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”

17 U.S.C. §302(d)(1). However, under 17 U.S.C. §204(a), a transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and **signed by the owner of the rights conveyed**.

Based upon the foregoing provisions of the Copyright Act, it has been uniformly held by the courts that copyright law precludes the free assignment of nonexclusive licenses such as was granted

under the Master License Agreement by WesternGeco to the Debtors, and that it therefore constitutes “applicable law” under Bankruptcy Code §365 (c)(1)(A) that “excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . .”. See, e.g., *In re Sunterra Corporation*, 361 F.3d 257, 262 (4<sup>th</sup> Cir. 3/18/04); *In re Golden Books Family Entertainment, Inc.*, 269 B.R. 300, 309-310 (Bkrtcy. D.Del. 11/8/01); *In re Patient Education Media, Inc.*, 210 B.R. 237, 243 (Bkrtcy. S.D.N.Y. 6/30/97).

35. In light of the foregoing, because WesternGeco does not consent to the assumption and assignment of the Debtors’ rights under the Master License Agreement to third parties, the Debtors should be precluded under Bankruptcy Code §365 (c)(1), from doing so.

**C. Assumption of the Master License Agreement Should be Denied As WesternGeco is Entitled to Termination of the Master License Agreement under Bankruptcy Code §365(e)(1)**

36. A corollary to Bankruptcy Code § 365(c)(1)(A) appears in Bankruptcy Code § 365(e)(2).<sup>3</sup> While, under Bankruptcy Code § 365(e)(1), “ipso facto” clauses contained in executory contracts are generally stated to be unenforceable, Bankruptcy Code § 365(e)(2) sets forth an exception to that general rule. *In the Matter of: Mirant Corporation*, 440 F. 3d 238, 245-246 (5<sup>th</sup> Cir. 2/13/06).<sup>4</sup>

37. Bankruptcy Code §365(e)(1) provides in pertinent part that:

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<sup>3</sup> The courts addressing § 365(e)(2) have opined that it and § 365(c)(1) are closely related and that § 365(e)(2) addresses the same executory contracts that fall within the scope of § 365(c)(1). *In re Footstar, Inc.*, 337 B.R. 785, 788 (Bkrtcy. S.D.N.Y. 5/10/05). Further, it has been held that although Section 365(c)(1) and § 365(e)(2) may seem unnecessarily duplicative, the purpose “is to make it clear that not only may a nonassumable contract...not be assumed or assigned, but that the obligations of the other party may be terminated.” Collier on Bankruptcy ¶ 365.07[2] (15th ed.2005).

<sup>4</sup> “[W]hat Section 365(e)(1) giveth, Section 365(e)(2) may taketh away.” *Siegal v. Calvin*, 190 B.R. 639, 643 (Bkrtcy. D.Ariz. 1/12/96).



Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

- (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
- (B) the commencement of a case under this title; or
- (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

38. Nevertheless, Bankruptcy Code §365(e)(2) goes on to state that:

Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if —

- (A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
- (ii) such party does not consent to such assumption or assignment . . .

Thus, read together, the plain meaning of Bankruptcy Code §§365(e)(1) and (2) is that an executory contract's ipso facto clause may be enforced if “applicable law excuses a [nondebtor] party ... from accepting performance from or rendering performance ... to an assignee of such contract” and that non-debtor party does not consent to “such assumption or assignment.” *In re Mirant Corp.*, 440 F.3d at 249.

39. The Master License Agreement contains an “ipso facto clause” stipulating that in the event the Debtors commit an “act of bankruptcy, or assign, voluntarily or involuntarily, its assets for the benefit of its creditors or should proceedings be commenced against or by Licensee

under any bankruptcy, insolvency or similar statute, this License Agreement may be terminated at any time by WesternGeco.”

40. Further, as explained previously, “applicable law” in the form of the United States copyright law exists that excuses WesternGeco from accepting performance of the Master License Agreement from or rendering performance to an entity other than the Debtors, and WesternGeco does not consent to the assumption of the Master License Agreement.

41. Thus, WesternGeco is entitled to termination of the Master License Agreement, and the return of all of the licensed seismic data and information in accordance with the terms of the Master License Agreement.

#### **IV. CONCLUSION**

WHEREFORE, for the reasons set forth herein, WesternGeco, L.L.C. respectfully requests that the Bankruptcy Court sustain this objection and reject the Debtors’ attempt to assume and assign its rights under the License Agreements with WesternGeco in violation of Bankruptcy Code § 365 (c)(1)(A), Bankruptcy Code §365(e)(1), the provisions of the Master License Agreement, and United States copyright law. WesternGeco further gives notice of its intention, as soon as is reasonably practicable, to seek to vacate the Orders approving the sale and assignment of WesternGeco’s Master License Agreement and licensed Seismic Data, and of its intention to seek an order of the Court terminating the automatic stay for the purpose of terminating the Master License Agreement. Finally, WesternGeco, LLC, further prays for such other relief as is just.

Respectfully submitted:

/ Andrew A. Braun

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was served via electronic mail on the 11th day of February, 2016, to all parties in interest listed on the ECF service list requesting notice.

/s/ Andrew A. Braun