

**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
	*	

**WESTERNGECO, L.L.C.'S MOTION TO PARTIALLY VACATE
(1)THE COURT'S ORDER AUTHORIZING AND APPROVING (A) STALKING HORSE
PURCHASE AGREEMENT, (B) BIDDING PROCEDURES, (C) PROCEDURES FOR
DETERMINING CURE AMOUNTS FOR EXECUTORY CONTRACTS AND
UNEXPIRED LEASES, AND (D) RELATED RELIEF [DKT. NO. 180] AND
(2) ORDER (I) AUTHORIZING AND APPROVING THE DEBTORS TO SELL
SUBSTANTIALLY ALL OF THEIR PROPERTY FREE AND CLEAR OF ALL RIGHTS,
LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES, (II) AUTHORIZING THE
DEBTORS TO ASSUME AND ASSIGN CERTAIN EXECUTORY CONTRACTS AND
UNEXPIRED LEASES, AND (III) GRANTING RELATED RELIEF [DKT. NO 377]**

**A HEARING WILL BE CONDUCTED ON THIS MATTER
ON MARCH 28, 2016 AT 1:30 P.M. IN COURTROOM 404,
UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, 515 RUSK AVENUE,
HOUSTON, TX 77002.**

**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-THREE
(23) 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.**

TO THE HONORABLE MARVIN ISGUR, UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, WesternGeco, L.L.C. ("WesternGeco"), a party in interest herein, and

respectfully moves the Court, pursuant to Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60, to partially vacate the Court's (1) Order Authorizing and Approving (a) Stalking Horse Purchase Agreement, (b) Bidding Procedures, (c) Procedures for Determining Cure Amounts for Assumption and Assignment of Executory Contracts and Unexpired Leases and (d) Related Relief [Dkt. No. 180] and the Court's (2) Order Authorizing and Approving the Debtors to (I) Sell Substantially all of their Property Free and Clear of all Rights, Liens, Claims, and Encumbrances, (II) Authorizing the Debtors to Assume and Assign Certain Executory Contracts and Unexpired Leases and (III) Granting Related Relief [Dkt. No. 377] to the extent that these orders approve of the assumption, assignment and/or sale of WesternGeco's Master License Agreement and/or licensed seismic data or otherwise affect WesternGeco's rights or interests. As is discussed more fully below, WesternGeco was not properly notified of this bankruptcy proceeding, the motions seeking these orders, the hearings thereon, or the Debtors' intent to assume, assign and/or sell WesternGeco's Master License Agreement and licensed seismic data, and WesternGeco's Master License Agreement is a non-assignable executory contract under Bankruptcy Code §365 (c)(1)(A). Thus, the referenced orders of the Court should be vacated with respect to WesternGeco.

SUMMARY OF MOTION

WesternGeco licensed 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 on November 6, 2015 the Debtors filed the Sale Motion, in which it was proposed, among other things, that substantially all of the Debtors' assets, including the Debtors' seismic data,

would be sold free and clear of all claims, encumbrances, liens and other interests, and expedited procedures were proposed for the assumption and assignment of executory contracts as well as the filing of objections thereto, the Debtors failed to place WesternGeco on their mailing matrix or provide WesternGeco with any other notice of the Sale Motion, the hearing thereon, or even of the filing of their bankruptcy proceedings. 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 had already expired. As a result, WesternGeco was again deprived of the right to assert a timely objection to the Supplemental Notice and the assumption and assignment of its Master License Agreement and seismic data to any third party.

As soon as practicable after it received the Supplemental Notice, WesternGeco filed 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, the United States Copyright Act excuses WesternGeco from accepting performance from or rendering performance to an entity

other than the Debtors. However, since the objection was filed after the objection deadline and after the Court's final order authorizing the Debtors to assume and assign executory contracts, the Court will not be in a position to hear and rule upon WesternGeco's objection unless the Orders approving the sale and assignment of WesternGeco's Master License Agreement and licensed seismic data are vacated as to WesternGeco. Thus, WesternGeco files the instant motion seeking an order partially vacating the above Orders to the extent that they approve of the assumption, assignment and/or sale of WesternGeco's Master License Agreement or licensed seismic data or otherwise affect WesternGeco's rights or interests.

JURISDICTION, BACKGROUND AND PROCEDURAL POSTURE

I. Jurisdiction

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157.

This Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N) and (O).

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

II. WesternGeco's Business and its Master License Agreement with Debtors' Predecessor

3. 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. Under its 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") and then grants 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.

4. 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. 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.

5. 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. These terms and conditions included, but were not limited to, the stipulations and requirements that: (1) the Seismic Data is protected by international and United States trade secret and copyright laws; (2) title to and ownership rights in such data shall at all times remain with WesternGeco; (3) the Seismic Data would not be disclosed or transferred to third parties except as provided in the Master License Agreement; (4) any transfer of data to Third Parties required advance written notice to and consent from WesternGeco; and (5) all Seismic Data would be returned to WesternGeco upon expiration or termination of the Master License Agreement. *See* Master License Agreement, p. 1, ¶1; p. 4, ¶2(A); p. 5, ¶¶ 2 (B) & 4(A); pp. 6-7, ¶¶ 4(A)(iv) – (vii); p. 7, ¶¶ 4(B) and (C).

6. In addition, the Master License Agreement provided that the Master License

Agreement would automatically terminate upon breach of confidentiality or restrictions on the use, disclosure or transfer of data and that WesternGeco may terminate the Master License Agreement in the event of the filing of a bankruptcy proceeding by or against the licensee. *See* Master License Agreementp. 9, ¶¶ 7(A)(i) & (A)(iv).

III. The Debtors' Bankruptcy Case and Proceedings Affecting WesternGeco

7. On 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").

8. 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.

9. On October 28, 2015, the Court entered an Order Granting Complex Chapter 11 Bankruptcy Case Treatment [Dkt. 43] designating the case as a complex Chapter 11 case. The Order required all motions and other matters requiring a hearing to state that any party objecting to the motion had 23 days from the date of service to file a response.

10. On November 6, 2015, the Debtors filed their Sale Motion [Dkt. No. 90], which 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; (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”).

11. 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 (the “Desired 365 Contracts”) by filing and serving, by U.S. Mail upon the counterparties to such Desired 365 Contracts, an Assumption Notice (the “Assumption Notice”), which reduced the time period for objections 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.

12. A hearing was held on the Sale Motion on December 2, 2015, and on the same day, 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 the procedures for the assumption and assignment of Desired 365 Contracts (the “Assumption and Assignment Procedures”), and setting a date for the Sale Hearing. The Sale and Bid Procedures Order required Debtors, within three days of the Order, to serve a Transaction Notice and the above described Assumption Notice, both of which advised all recipients of a January 11, 2016 deadline for objections to the Transactions and to assumption and assignment of Desired 365 Contracts, on all counterparties to executory contracts to be assumed and assigned in connection with the Transactions. Dkt. No. 180 at ¶ 6, 9. As requested in the Sale Motion, the

Order also permitted Debtors to amend the Assumption Notice to add Desired 365 Contracts at any time prior to Closing, provided that the counterparty was given five days to object. Dkt. No. 180 at ¶ 12. The Order further provides that any person failing to file a timely objection to the Transaction or to the assumption and assignment of Desired 365 Contracts is deemed to consent to same and that the Order is effective and enforceable immediately upon entry. *Id.* at 13-16, 23.

13. 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 Joint Plan of Liquidation [Dkt. No. 376].

14. On January 19, 2016, the Court entered an Order [Dkt No. 377] (the "Final Sale Order") granting final approval of the Debtors' assumption of the Desired 365 Contracts and assignment of same to the Buyer upon the occurrence of the Closing Date as well as the Sale of Debtors' Assets. The Final Sale Order provides that, as of the Closing Date, the Buyer shall succeed to the entirety of the Debtors' rights and obligations in the Desired 365 Contracts. Dkt. No. 377 at ¶ 31. The Final Sale Order also permits Debtors to continue to amend the Assumption Notice by adding new Desired 365 Contracts at any time prior to Closing, provided that counterparties are given five days to object. *Id.* at ¶ 33. It further provides that any entity that had a right to consent to assumption or assignment but failed to do so is deemed to have consented to same. *Id.* at ¶ 35.

15. At no time during the pendency of the Debtors' bankruptcy proceedings was WesternGeco placed on the Debtors' mailing matrix or otherwise provided written 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, specifically including the Debtors' seismic data.

16. 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 additional 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 counterparties to the added Desired 365 Contracts sought to be assumed and assigned, including WesternGeco, until January 27, 2016, five (5) days, to file any objections thereto.

17. 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.

18. On February 11, 2016, as soon as practicable after receiving the Supplemental Notice, WesternGeco filed its Late-filed Objection to the Supplemental Notice and the Sale Motion [Dkt. 417], which explained that WesternGeco was not timely notified of the above proceedings and that WesternGeco objected 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, the United States Copyright Act excuses WesternGeco from accepting performance from or rendering performance to an entity other than the Debtors, and WesternGeco does not consent to the Debtors' assignment of its Master License Agreement and Seismic Data to the acquirer of the Debtors' assets.

19. WesternGeco was 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, the Sale Motion, the Supplemental Notice and the proposed assumption and assignment of its Master License Agreement and licensed Seismic Data, and therefore, WesternGeco respectfully moves the Court to vacate the Sale and Bid Procedures Order and the Final Sale Order (collectively, the "Sale Orders") to the extent that they approve of the assumption,

assignment and/or sale of WesternGeco's Master License Agreement and licensed Seismic Data or otherwise affect WesternGeco's rights or interests.

LAW AND ARGUMENT

I. The Sale Orders must be vacated to the extent that they affect WesternGeco because WesternGeco was not provided with proper notice of the proceedings affecting its rights.

20. Fed. R. Bankr. P. 9024 provides that Fed. R. Civ. P. 60 generally applies to cases under the Bankruptcy Code, with some modifications. Fed. R. Civ. P. 60(b) provides that, on motion and just terms, a court may relieve a party from a final judgment, order, or proceeding for reasons including "(1) mistake, inadvertence, surprise, or excusable neglect...(4) the judgment is void...or (6) any other reason that justifies relief." A bankruptcy sale order is a final judgment that can be vacated under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60.¹

A. The Sale and Bid Procedures Order and the Final Sale Order are void with respect to WesternGeco due to the Debtors' failure to notify WesternGeco of their motion seeking these orders.

21. Failure or inadequacy of notice raises due process issues that may render a judgment void under Rule 60(b)(4).² In that case, the Court is required to vacate the judgment.³ The due process obligation to provide reasonable notice and to afford interested parties an opportunity to be heard applies to all proceedings involving disposition of property, including those in bankruptcy.⁴ Therefore, a party seeking relief in bankruptcy court is not entitled to

¹ See *In re Noram Res., Inc.*, No. 08-38222, 2011 WL 6936361, at *9-10 (Bankr. S.D. Tex. Dec. 30, 2011).

² *In re Aztec Supply Corp.*, 399 B.R. 480, 492 (Bankr. N.D. Ill. 2009)(Unnoticed provision which was buried in middle of cash collateral order submitted for bankruptcy court's approval, and which purported to authorize bank, without notice to party holding its cashier's check, to stop payment thereon, could be set aside on motion by party holding check due to lack of notice).

³ *Id.*

⁴ *In re Westway Ford, Inc.*, 170 B.R. 101, 102 (Bankr. S.D. Tex. 1994)(parties who did not receive notice were relieved from the terms of a confirmed plan); *In re REPH Acquisition Co.*, 134 B.R. 194 (N.D. Tex. 1991)(debtor did not assume lease absent notification to lessor of contents of proposed plan); *In re Griffin Oil Co., Inc.*, 149 B.R. 419

“achieve a ‘fait accompli’ with respect to the protectable interests of parties who did not receive notice prior to any loss with respect to their interest.”⁵

22. In accordance with the bedrock principle of due process, the Federal Rules of Bankruptcy Procedure are replete with notice requirements.⁶ For example, in cases such as this, where an executory contract is sought to be assumed by motion, courts require “strict adherence to the requirements of §365 and Rules 6006 and 9014 out of concern with protecting unknowing [contractual partners] from the consequences of an assumption of which they had no notice and which [they] had no opportunity to contest.”⁷ Fed. R. Bankr. P. 6006 provides that notice of a proceeding to assume or assign an executory contract “shall be given to the other party to the contract” in accordance with Fed. R. Bankr. P. 9014. Rule 9014, which applies to all contested motions not otherwise addressed by the rules, requires that “reasonable notice and opportunity for hearing” be afforded to the party against whom relief is sought within the time determined under Rule 9006(d)(at least seven days prior to hearing). In addition, this Court’s Order Granting Complex Chapter 11 Bankruptcy Case Treatment [Dkt. 43] requires that all motions provide for a period of 23 days within which any opposing party may object, and Local Rule 9013-1 requires that notice of motions be provided to all parties who have property interests that may be affected by such motion. Further, under the general rules for sale motions in complex cases, (1) all entities known or reasonably believed to have asserted an interest in any of the assets offered for sale and

(Bankr. E.D. Tex. 1992)(party which did not receive adequate notice of confirmation hearing was not bound by the terms of a Chapter 11 plan).

⁵ *In re Nat’l Gypsum Co.*, 208 F.3d 498, 512 (5th Cir. 2000)(a debtor has a responsibility to assure that the non-debtor party to an executory contract is on notice of the debtor’s specific intent to assume the contract with whatever cure amount the debtor thinks is owing).

⁶ *Id.*

⁷ *Id.* citing *South Street Seaport Ltd. Partnership v. Burger Boys, Inc. (In re Burger Boys, Inc.)*, 94 F.3d 755, 763 (2d Cir.1996)(vacating district court’s decision to allow assumption where lessee was not provided formal notice by motion and was deprived of an opportunity to contest the matter). See also *In re Texas Rangers Baseball Partners*, 521 B.R. 134, 180 (Bankr. N.D. Tex. 2014)(“notice to non-debtor parties to an executory contract is paramount”).

(2) all parties to executory contracts proposed to be assumed and assigned or rejected as part of the proposed transaction must be provided with notice of both the motion to approve the sale procedures and the motion to approve the sale.⁸

23. In addition to the above requirements, Fed. R. Bankr. P. 2002(a) provides for 21 days' notice to parties in interest of any proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice, and Fed. R. Bankr. P. 6004(c) provides that a motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014, above, with service on the parties who have liens or "other interests" in the property to be sold. Thus, the debtor in possession must ensure "parties in interest," including entities whose pecuniary interests might be directly and adversely affected by the proposed action, have adequate notice and opportunity to be heard before their interests may be adversely affected by a sale under Bankruptcy Code §363.⁹ Further, courts recognize that failure to inform a claimant of "bankruptcy proceedings in general" violates Fifth Amendment due process.¹⁰ In short, parties whose interests may be affected by bankruptcy proceedings are entitled to notice before those interests are impacted.

24. Here, the only notice ever provided to WesternGeco of this bankruptcy proceeding

⁸ Procedures for Complex Chapter 11 Bankruptcy Cases, Exhibit C.

⁹ *In re Savage Indus., Inc.*, 43 F.3d 714, 720 (1st Cir. 1994)(Since product liability plaintiff and retailer of product, as "parties in interest" in manufacturer's bankruptcy case, were never afforded appropriate notice of Chapter 11 proceeding, the Chapter 11 plan and terms of all-asset transfer agreement did not affect plaintiff's and retailer's successor liability claims against transferee and debtor). *See also Compak Companies, LLC v. Johnson*, 415 B.R. 334 (N.D. Ill. 2009)(Bankruptcy court's order approving sale of all of patent owner's business assets violated sublicensees' due process rights, and thus was void insofar as it purported to extinguish sublicensees' patent license where, even if sublicensees' president had actual notice of licensor's bankruptcy, sublicensees were not listed in licensor's bankruptcy schedules and sublicensees were not provided notice of the sale or an opportunity to seek adequate protection).

¹⁰ *In re Texas Tamale Co., Inc.*, 219 B.R. 732, 738 (Bankr. S.D. Tex. 1998)("...it is also easy to see how not informing a claimant of the bankruptcy proceedings in general would violate the Fifth Amendment. In such a situation, the claimant would have no indication the bankruptcy is proceeding at all. It would be the height of inequity to impair that creditor's rights without giving an opportunity to participate in the reorganization process...")

was the January 22, 2016 Supplemental Notice of Possible Assumption and Assignment of Executory Contracts, which gave WesternGeco only five (5) days from the date of mailing to object to the assumption, assignment and/or sale of its Master License Agreement and licensed Seismic Data, no matter if or when the notice was actually received by WesternGeco.

25. WesternGeco submits that five days' notice from the date of mailing is not sufficient to satisfy the due process clause of the Fifth Amendment, which requires that notice be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections."¹¹ The noticing party bears the burden of demonstrating proper notice, which must "afford a reasonable time for those interested to make their appearance,"¹² and courts have recognized that time periods longer than five days for bankruptcy objections did not satisfy due process.¹³ In the instant case, five days was not sufficient time for WesternGeco's representatives to actually receive, review and file a proper objection to the Supplemental Notice, particularly in light of the fact that WesternGeco was not otherwise on notice of the bankruptcy proceeding or the Sale Motion, and further,

¹¹ *In re Metzger*, 346 B.R. 806, 816 (Bankr. N.D. Cal. 2006)(Chapter 11 sale order was void as to county even though it had actual notice of a Chapter 11 proceeding because it was not notified of the sale hearing and county was entitled to notice of a certain specificity, affording it a certain amount of time to prepare for and appear at the hearing at which the bankruptcy court would be asked to rule on elimination of its interest in property)

¹² *In re Griffin Oil Co., Inc.*, 149 B.R. 419, 422 (Bankr. E.D. Tex. 1992).

¹³ Several courts have considered how much notice is required for objections in the context of proofs of claims and dischargeability. *See In re Barr*, No. 08-60510-MGD, 2009 WL 6499257, at *1 (Bankr. N.D. Ga. Feb. 9, 2009)("Where, as here, the creditor receives fewer than ten days' notice...the creditor has not received notice early enough to satisfy the requirements of due process and the bar date cannot be applied to that creditor's claim."); *In re Smith*, 379 B.R. 315, 328 (Bankr. N.D. Ill. 2007), *aff'd sub nom. Smith v. Tidwell*, 08 C 46, 2008 WL 4067306 (N.D. Ill. Aug. 27, 2008), *aff'd sub nom. In re Smith*, 582 F.3d 767 (7th Cir. 2009)(notice received sixteen days prior to the deadline for filing objections under 11 U.S.C. § 523(c)(1) was not sufficient for Fifth Amendment purposes); *In re Walker*, 149 B.R. 511 (Bankr. N.D. Ill. 1992)(Unscheduled creditor which received notice that debtor was in bankruptcy 20 days before the bar date for filing complaints objecting to discharge was entitled to an extension of the bar date where it was clear that the debtor knew or should have reasonably ascertained the identity and location of the creditor); *Manufacturers Hanover v. Dewalt (In re Dewalt)*, 961 F.2d 848 (9th Cir.1992)(Notice to unscheduled creditor of bankruptcy filing only seven days before bar date for dischargeability complaints was insufficient, and 30 days' advance knowledge of case was necessary in order to bar creditor's dischargeability complaint as untimely, even though creditor, acting under ideal circumstances and with utmost of diligence, could have filed for extension of time).

WesternGeco did not in fact receive the notice until late in the day on the date of the objection deadline, and even then, the notice was not actually delivered to someone who was in a position to read and do anything about it until the following day, after the objection deadline had already expired. The Supplemental Notice, therefore, did not provide WesternGeco with notice reasonably calculated to afford it an opportunity to object. Notably, the Sale and Bid Procedures Order required that a Transaction Notice and an Assumption Notice be served on WesternGeco, as the counterparty to an executory contract that might be assumed and assigned, within 3 days of that Order (by December 5, 2015). If the notices had been sent at that time, WesternGeco would have had sufficient time to object prior to the original objection deadline, which was set for January 11, 2016.

26. Even though the Court approved the five-day period for objections contained within the Supplemental Notice in its Sale and Bid Procedures Order, WesternGeco also cannot be bound by the Sale and Bid Procedures Order because it was never notified of or given an opportunity to object to the Debtors' Sale Motion, which originally sought approval of the five-day objection period. Similarly, because WesternGeco was never notified of the Sale Motion, it cannot be bound by the Final Sale Order, which purports to allow Debtors to assume and assign Desired 365 Contracts, including WesternGeco's Master License Agreement, to the Buyer. Under Fed. R. Bankr. P. 9014, the Court's Order Granting Complex Chapter 11 Bankruptcy Case Treatment, Local Rule 9013-1 and/or Fed. R. Bankr. P. 2002(a), WesternGeco, as a party claiming an interest in the property affected by the Sale Motion, was entitled to receive notice of the Sale Motion with 23 days to object to the relief requested therein. Because WesternGeco never received any notice of the Sale Motion prior to entry of the Sale Orders, the Sale Orders cannot

affect WesternGeco's rights or property interests in any manner, including (1) by application of the abbreviated five-day objection period or (2) by approving the assumption, assignment and/or sale of WesternGeco's Master License Agreement and licensed Seismic Data.

27. Finally, as a party with an interest in the property at issue in Debtors' bankruptcy proceeding, WesternGeco was entitled to notice of Debtors' bankruptcy proceeding as a whole before its property interests could be affected. WesternGeco was entitled to actual notice of all proceedings because its identity was known to Debtors via the Master License Agreement and Debtors intended from the beginning of this case to sell their seismic data.¹⁴ However, WesternGeco was not included on Debtors' mailing matrix or listed on Schedule G disclosing executory contracts, and therefore, it never received any notice of the bankruptcy proceedings until after the Court's approval of the assumption, assignment and/or sale of its Master License Agreement and licensed Seismic Data pursuant to the Supplemental Assumption Notice and the Sale Orders. Debtors' failure to provide WesternGeco with proper notice of the Supplemental Notice, the Sale Motion and the bankruptcy proceedings in general renders the Sale Orders void as to WesternGeco, and therefore, they must be vacated to the extent that they authorize the assumption, assignment and/or sale of WesternGeco's Master License Agreement and licensed Seismic Data or otherwise affect WesternGeco's rights or property interests.

¹⁴ Actual notice of the debtor's bankruptcy filing and of the deadline for filing claims is required, as matter of due process, to creditors whose identities are known or "reasonably ascertainable." *In re Motors Liquidation Co.*, 529 B.R. 510 (Bankr. S.D.N.Y. 2015)(While notice by publication of sale of assets of bankrupt automobile manufacturer would, as general rule, be sufficient to satisfy due process rights of owners of vehicles not known to have filed claims against debtor-manufacturer, knowledge that at least 24 of debtor-manufacturer's engineers, senior managers, and attorneys possessed of ignition switch defects in certain vehicle models that created a safety hazard and that required recall of these vehicles, along with knowledge of names and addresses of owners of defective cars served to make owners of these vehicle models "known creditors," to whom debtor-manufacturer had a due process obligation to provide actual notice).

B. Even if the Sale Orders are not void for lack of notice and due process, they should be vacated due to inadvertence, excusable neglect or for other reasons that justify relief.

28. Even if the Court finds that the Sale Orders are not void with respect to WesternGeco due to lack of notice, the Court may still vacate the Sale Orders as a result of inadvertence, excusable neglect or for any other reason that justifies relief under Fed. R. Civ. P. 60. In evaluating whether a party's neglect is excusable, courts engage in a fact-specific inquiry, as described by the Supreme Court in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship*:

[b]ecause Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include ... the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.¹⁵

For example, courts have found excusable neglect where a creditor fails to comply with the bar date because, through no fault of its own, it had no notice of that date.¹⁶ In addition, Rule 60(b)(1) also permits a court to grant relief from a judgment due to inadvertence or surprise. Finally, to the extent that other sections of Rule 60 do not apply, courts may resort to Rule 60(b)(6), which applies in extraordinary circumstances where a party is unable to take the necessary legal action "for reasons beyond his or her control."¹⁷

29. In this case, even if Debtors' Supplemental Notice could constitute appropriate notice to WesternGeco, which is denied, the Sale Orders should still be vacated with respect to

¹⁵ *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 395 (1993).

¹⁶ *In re William B. Wilson Mfg. Co.*, 59 B.R. 535, 538 (Bankr. W.D. Tex. 1986).

¹⁷ *In re FEMA Trailer Formaldehyde Products Liab. Litig.*, No. 10-2248, 2011 WL 6748489, at *4 (E.D. La. Dec. 21, 2011).

WesternGeco because WesternGeco's failure to object within the five-day period was inadvertent or a result of excusable neglect. WesternGeco failed to timely object to the assumption and assignment of its Master License Agreement and licensed Seismic Data solely because WesternGeco did not receive the Supplemental Notice at its mail facility until late in the afternoon on January 27, 2016, the date of the deadline for filing objections. In addition, the Supplemental Notice did not make its way to an employee capable of understanding the import of the notice until the morning of January 28, 2016, after the objection deadline had already expired.

30. As soon as practicable after receiving the Supplemental Notice, WesternGeco consulted counsel and filed its Late-filed Objection to the Supplemental Notice and the Sale Motion [Dkt. 417]. Thus, WesternGeco's delay in filing an objection was the result of circumstances outside of its control, and in good faith, it filed an objection as soon as practicable after learning of the Supplemental Notice. In addition, if the Court vacates the Sale Orders only with respect to WesternGeco's interests, there is no risk that the proceeding will be delayed or that the Debtors will be prejudiced. Accordingly, to the extent that the Sale Orders are not void with respect to WesternGeco, they should still be partially vacated as a result of inadvertence, excusable neglect or under the catchall provision of Fed. R. Civ. P. 60.

CONCLUSION

WHEREFORE, for the reasons set forth herein, WesternGeco, L.L.C. respectfully requests that the Court, pursuant to Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60, vacate the Court's (1) Order Authorizing and Approving (a) Stalking Horse Purchase Agreement, (b) Bidding Procedures, (c) Procedures for Determining Cure Amounts for Assumption and Assignment of Executory Contracts and Unexpired Leases and (d) Related Relief [Dkt. No. 180] and the Court's

(2) Order Authorizing and Approving the Debtors to (I) Sell Substantially all of their Property Free and Clear of all Rights, Liens, Claims, and Encumbrances, (II) Authorizing the Debtors to Assume and Assign Certain Executory Contracts and Unexpired Leases and (III) Granting Related Relief [Dkt. No. 377] to the extent that these orders approve of the assumption, assignment and/or sale of WesternGeco's Master License Agreement and/or licensed Seismic Data or otherwise affect WesternGeco's rights or interests, and grant WesternGeco such other and further relief as is just and equitable.

Respectfully submitted:

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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 26th day of February, 2016, to all parties in interest listed on the ECF service list requesting notice.

/s/ Andrew A. Braun_____