

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

**IN RE:** §  
§ **CASE NO. 15-35615**  
§  
**RAAM GLOBAL ENERGY COMPANY,** §  
*et al.*,<sup>1</sup> § **(Chapter 11)**  
§  
§ **(JOINTLY ADMINISTERED)**  
**DEBTORS.** §

**UPSTREAM EXPLORATION LLC'S  
RESPONSE TO 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]**

---

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number were RAAM Global Energy Company [2973], Century Exploration New Orleans, LLC [4948], Century Exploration Houston, LLC [9624], and Century Exploration Resources, LLC [7252].

Upstream Exploration LLC (“Upstream”) submits this response (this “Response”) to *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] [Docket No. 432] (the “Motion”).* By this Response, Upstream requests that the Court deny the Motion. Upstream incorporates by reference the *Declaration of Mark Wojna in Support of Upstream Exploration LLC’s Response* (the “Wojna Decl.”), filed contemporaneously herewith. In further support of this Response, Upstream respectfully states as follows:

### **Preliminary Statement**<sup>2</sup>

1. Neither this bankruptcy nor the assumption of WesternGeco’s seismic data licenses are news to WesternGeco.
2. In the months leading up to the bankruptcy, a WesternGeco representative told the Debtors’ predecessors that WesternGeco would consent to a transfer of its licenses, at no additional cost, in a debt-for-equity restructuring.
3. On February 1, 2016, Upstream consummated its purchase of certain of the Debtors’ assets pursuant to the Sale Order. WesternGeco did not object to the Sale Order. Nor did it seek to participate in the bankruptcy proceedings at any point. Instead, WesternGeco inexplicably waited until the sale of the Debtors’ assets and the assumption of WesternGeco’s licenses were *final*. It now feigns surprise in an attempt to overturn both.

---

<sup>2</sup> Capitalized terms have the meanings set forth in the Background and Argument sections of this Response.

4. Contrary to WesternGeco's pre-bankruptcy assurances, WesternGeco reversed course and demanded a multi-million dollar fee in exchange for its consent to a transfer of its seismic data licenses. As the Debtors' negotiator has declared, and as emails between WesternGeco's agents and the Debtors show, WesternGeco was well aware of the Debtors' bankruptcy proceedings and proposed sale.

5. In addition, on multiple occasions, the Debtors gave WesternGeco notice, directly and to its parent, of the bankruptcy cases and the ongoing sale process, including the procedure to assume contracts on five days' calendar notice to contract counterparties. WesternGeco had multiple opportunities to participate in and object to the sale process; it did not do so.

6. WesternGeco admits that on January 28, 2016 the Supplemental Notice was delivered to someone "in a position to read, analyze and recognize [its] significance." *See* Motion, ¶ 17. Yet, WesternGeco chose not to file a simple objection, alerting the Court and parties in interest of any issues.

7. Rather, WesternGeco waited 14 days—during which time the sale was consummated—before filing a legally meaningless objection. Fifteen days after that, and 29 days after it admits that someone in a position to act read the Supplemental Notice, WesternGeco filed the Motion. This impermissible collateral attack on the Court's Bidding Procedures Order and Sale Order should be denied.

8. Moreover, there is nothing excusable or equitable about WesternGeco's conduct. WesternGeco (a) knew about the Debtors' bankruptcy and used it as an excuse to extract a fee that it had previously assured the Debtors it would not seek, (b) could have filed—but chose not to file—a timely objection to the sale procedures or otherwise participated in the bankruptcy proceedings, and (c) could have sought—but chose not to seek—a timely adjudication of the issues it raises nearly two months after this case went effective.

9. In sum, WesternGeco chose to forgo all options for openly participating in the Debtors' bankruptcy proceedings, instead pursuing private negotiations for a fee that it was not entitled to receive. Having failed to extract a fee from the Debtors, WesternGeco now pursues a post-consummation collateral attack on the Bidding Procedures Order and Sale Order, based on two false premises: that it did not know about the Debtors' bankruptcy and that it did not know soon enough to contest assignment of its contract under the established procedures.

### **Background**

#### **I. WesternGeco and the Debtors Anticipated Transfer of WesternGeco's Seismic Data and Discussed that Transfer Repeatedly *After* the Bankruptcy Proceedings Began.**

10. Seismic data is critically important to exploration and production companies, which interpret the data to generate, evaluate, and develop drilling prospects and market those prospects to potential partners. Wojna Decl. ¶ 11. Over the past 25 years, the Debtors and their predecessors invested more than \$90 million to acquire seismic data from various seismic contractors, including approximately \$14.5 million with WesternGeco, L.L.C. ("WesternGeco") and its affiliates. *Id.* The Debtors and their predecessors utilized the seismic data licensed from WesternGeco and affiliates to generate a portion of the current prospect drilling program acquired by Upstream. Wojna Decl. ¶ 13.

11. In so doing, the Debtors invested substantial resources to process and supplement the seismic data, transforming it into custom-tailored and immensely valuable business materials. Wojna Decl. ¶ 12. Specifically, the Debtors and their predecessors enhanced and improved data licensed by WesternGeco and its affiliates by investing approximately \$2.3 million to reprocess the data on a proprietary basis. *Id.*

12. Beginning on April 15, 2003, the Debtors licensed certain seismic data from WesternGeco on a non-exclusive basis, under a Master License Agreement (the "MLA")

between WesternGeco and Century Exploration Company, a predecessor to the Debtors. *See* Motion, ¶ 4.

13. Century Exploration Company remitted payments due under the MLA to WesternGeco at WesternGeco at Chase Bank of Texas, P.O. Box 200815, Houston, Texas 77216-0815. Wojna Decl. ¶ 10.

14. The MLA contemplates transfer of the licensed data from one entity to another, subject to certain provisions. For example, the MLA allows WesternGeco to condition its consent to a transfer on payment of an additional license fee, which “shall not exceed *thirty percent (30%)* of the then-current list price for the Transferred Data.” *See* Motion, Ex. 1 [Docket No. 417-1], Amended Section 4(A)(iv)(d) (emphasis in original).

15. In fact, WesternGeco and the Debtors specifically discussed transfer of the seismic data licenses nearly a year before entry of the Sale Order (as defined below). On April 22, 2015, David Seay, one of the Debtors’ land managers, emailed a WesternGeco representative and stated that, “[a]s a result of the decrease in oil prices,” the Debtors were exploring a debt-for-equity exchange with “with its first lien holder group (led by Highbridge Capital Management) and its second lien holder group (the owners of corporate bonds maturing later this year).” Wojna Decl., Ex. A. Seay requested “WesternGeco’s consent to this proposed transaction so that our license agreements with WesternGeco will remain in effect.” *Id.*

16. On May 11, 2015, Rachele Goldman, an attorney acting on behalf of WesternGeco, replied:

Based upon our conversations and the MLA, WesternGeco is willing to waive any right it may have to a Transfer fee in this particular instance wherein Century Exploration Company’s parent company Raam Global will undergo a change of ownership by virtue of certain lienholders taking equity in the company. . . . [W]e can provide written assurance (via this email) that we will not seek any additional compensation or terminate Century’s Data licenses as a result of these changes.

*Id.* Larry Galloway, a vice president at Geophysical Pursuit, Inc. (“GPI”), one of WesternGeco’s partners, was copied on this correspondence. *Id.*

17. After these Chapter 11 Cases were filed, WesternGeco and the Debtors continued the discussions, often between Mr. Galloway and Mark Wojna, the Debtors’ Exploration Manager. Wojna Decl. ¶ 3, 15-22. Mr. Wojna is now Upstream’s Vice President for Exploration. Wojna Decl. ¶ 3.

18. On December 2, 2015, Mr. Wojna emailed Mr. Galloway in response to Mr. Galloway’s request for a telephone call. Wojna Decl., Ex. B. Mr. Wojna explained that he had been making presentations that week “to potential buyers” of the Debtors’ assets. *Id.* Mr. Galloway responded, “Ok good.” *Id.*

19. On December 11, 2015, Mr. Galloway emailed Mr. Wojna and said, “Call me when you have a minute to discuss the attached map.” Wojna Decl., Ex. C. The map depicted some areas subject to the MLA. Wojna Decl. ¶ 17. On the phone, Mr. Galloway told Mr. Wojna that Mr. Galloway had permission from WesternGeco to negotiate a license transfer fee on behalf of WesternGeco and GPI. Wojna Decl. ¶ 18. On the same call, Mr. Wojna described the area of data that the Debtors anticipated transferring to the “NewCo.” *Id.*

20. On December 23, 2015, Mr. Galloway emailed Michael Willis, the Debtors’ president, stating that Mr. Galloway had discussed with WesternGeco a seismic data license transfer from Century Offshore, Inc. to the “Newco.” Wojna Decl., Ex. D. Mr. Galloway attached a map with a “WesternGeco” logo; the map included highlighted boxes showing the data sets that Mr. Wojna told Mr. Galloway that Mr. Wojna wanted to bring over to the NewCo. Wojna Decl., Ex. E; Wojna Decl. ¶ 19. Mr. Galloway stated that GPI and WesternGeco would agree to transfer the license for \$ [REDACTED] for that area. Wojna Decl., Ex. D; Wojna Decl. ¶ 19.

21. On or about January 15, 2016, Mr. Wojna had lunch with Mr. Galloway. Wojna Decl., Ex. F. Still unaware of the express proscription on assignment restrictions under section 365(f) of the Bankruptcy Code, Mr. Wojna told Mr. Galloway that he felt the price quoted in the email on December 23, 2015 was too high. Wojna Decl. ¶ 20. Mr. Wojna asked Mr. Galloway to provide two options based on an even more limited data set. *Id.*

22. On January 18, 2016, Mr. Galloway responded by email to Mr. Wojna:

As requested, GPI/WG will be willing to offer Upstream Exploration LLC the opportunity to license portions of data previously licensed by Century Offshore, Inc. as follows: Upstream will be owned by Highbridge Capital (present first lien holder to Ramm [sic] Global Energy, parent of Century Offshore) which provides our willingness to discount the license fees to Upstream. The data Upstream desires to license consist of 100% WesternGeco (Lake Salvador/Barataria Bay), along with JV data owned by GPI and WesternGeco (Black Bay, Grand Lake, Quarantine Bay).”

Wojna Decl., Ex. G. Mr. Galloway offered two options, one priced at \$ [REDACTED], and the second at \$ [REDACTED]. *Id.* Mr. Galloway followed up on February 1, 2016 asking, “Did you guys complete your transaction?” *Id.*

23. The discussions extended beyond Mr. Galloway and Mr. Wojna; others at WesternGeco were aware of the Debtors’ situation. For example, on January 8, 2016, Don DuBose, a seismic account representative at WesternGeco, who had been calling Mr. Wojna throughout the bankruptcy proceedings for regular updates, emailed Mr. Wojna: “Are you still in Business for 2016??” Wojna Decl., Ex. H.; Wojna Decl. ¶ 22.

## **II. WesternGeco Was Aware of These Bankruptcy Proceedings Through Multiple Channels.**

24. On October 26, 2015, the Debtors commenced chapter 11 cases (these “Chapter 11 Cases”) in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (this “Court”), by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”).

**A. The Debtors Provided WesternGeco with Notice of These Proceedings Throughout the Bankruptcy.**

25. The Debtors served WesternGeco at Chase Bank of Texas, P.O. Box 200815, Houston, Texas 77216-0815 with (a) notice of commencement of the Chapter 11 Cases;<sup>3</sup> (b) notice of the disclosure statement hearing;<sup>4</sup> (c) a “Notice of Transaction” that specifically referenced the Bidding Procedures Motion and Bidding Procedures Order (both as defined below) and set January 11, 2016, as the objection deadline for the sale;<sup>5</sup> and (d) solicitation materials.<sup>6</sup>

26. The Debtors served WesternGeco at 10001 Richmond Avenue, Houston, TX 77042 with the Supplemental Notice (as defined below) by U.S. Mail (first class) on January 22, 2016.<sup>7</sup>

**B. The Debtors Also Provided Notice to WesternGeco’s Parent, Schlumberger Technology Corporation.**

27. In 2006, Schlumberger Limited (“Schlumberger”) acquired WesternGeco.<sup>8</sup> Schlumberger has identified Schlumberger Technology Corporation as WesternGeco’s direct parent.<sup>9</sup>

28. During the Chapter 11 Cases, the Debtors served “Schlumberger Technology Corp.” with various notices, including notice of the commencement of the Chapter 11 Cases<sup>10</sup> and the “Notice of Transaction” that specifically referenced the Bidding Procedures Motion and

---

<sup>3</sup> See *Certificate of Service* [Docket No. 89].

<sup>4</sup> See *Certificate of Service* [Docket No. 187].

<sup>5</sup> See *Certificate of Service* [Docket No. 212]; *Notice of Transaction* [Docket No. 190].

<sup>6</sup> See *Certificate of Service* [Docket No. 302].

<sup>7</sup> See *Certificate of Service*, [Docket No. 396].

<sup>8</sup> See 2007 Schlumberger Limited SEC Form 10-K, p. 26 (Feb. 26, 2007), available at: <http://investorcenter.slb.com/phoenix.zhtml?c=97513&p=irol-sec>.

<sup>9</sup> See 2012 Schlumberger Limited SEC Form 10-K, p. 80 (Feb. 1, 2012), available at: <http://investorcenter.slb.com/phoenix.zhtml?c=97513&p=irol-sec>.

<sup>10</sup> See *Certificate of Service* [Docket No. 89].

Bidding Procedures Order (both as defined below) and set January 11, 2016, as the objection deadline for the sale.<sup>11</sup>

29. Additionally, the following Schlumberger-related entities received service during the Chapter 11 Cases, including service of the “Notice of Transaction”: E&P Wireline Services c/o Schlumberger Technology Corporation, Production Wireline & Cased Hole c/o Schlumberger, Schlumberger & E&P Offshore - Gulf Coast, and Schlumberger US Land.<sup>12</sup>

30. WesternGeco appears to be well integrated in Schlumberger’s larger operations. When communicating with the Debtors, WesternGeco representatives used email addresses ending in Schlumberger’s domain name: @slb.com. *See* Wojna Decl., Exs. A and H. And, the domain name “www.westerngeco.com” redirects visitors to a page on Schlumberger’s website: [http://www.slb.com/services/seismic/seismic\\_acquisition.aspx](http://www.slb.com/services/seismic/seismic_acquisition.aspx).

### **III. The Bankruptcy Proceedings in this Case**

31. The Chapter 11 Cases featured a parallel-track sale and confirmation process.

32. On November 6, 2015, the Debtors filed a motion seeking an order authorizing entry into a stalking horse purchase agreement and approving certain bidding procedures.<sup>13</sup> The Debtors attached as Exhibit D to the Bidding Procedures Motion a proposed assumption notice to be served on relevant parties (the “Assumption Notice”). *See id.* at ¶ 32. The Debtors also sought authority “to amend the Assumption Notice by adding or deleting Desired 365 Contracts at any time prior to the Closing,” provided that counterparties to any such added contracts would

---

<sup>11</sup> *See Certificate of Service*, [Docket No. 212].

<sup>12</sup> *See Certificate of Service*, [Docket No. 212].

<sup>13</sup> *See 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* [Docket No. 90] (the “Bidding Procedures Motion” or “Sale Motion”).

be given at least five calendar days from the date of mailing or ECF notification of the Amended Assumption Notice to properly object. *See id.* at ¶ 35(b).

33. The Court granted the Bidding Procedures Motion on December 2, 2015 and set a hearing date to consider a proposed sale.<sup>14</sup> Paragraph 12 of the Bidding Procedures Order provided:

The Debtors are authorized to amend the Assumption Notice by adding or deleting Desired 365 Contracts at any time prior to the Closing; provided, however, that counterparties to any such added 365 Contracts shall have at least five (5) calendar days from the date of mailing or ECF notification, as applicable, of the amended Assumption Notice to properly object to the assumption and assignment of their respective Desired 365 Contract and rights thereunder and the applicable Cure Amount.

*See id.* at ¶ 12.

34. On December 21, 2015, the Debtors filed the *Debtors' Second Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 286-2] (the "Plan"). Section 6.01 of the Plan provided that, pursuant to sections 365(a) and 1123(b)(2) of the Bankruptcy Code, on the Effective Date, "all executory contracts and unexpired leases that exist between the Debtors and any Person or Entity shall be deemed rejected by the Debtors, except for any executory contract or unexpired lease (i) that has been assumed or rejected pursuant to an order of the Bankruptcy Court entered prior to the Effective Date . . . ." Plan, § 6.01.

35. Immediately after a dual hearing on the proposed sale and Plan, on January 19, 2016, the Court entered an *Order Confirming Second Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 376] (the "Confirmation Order") and an *Order (I) Authorizing and Approving the Debtors to Sell Substantially All of Their*

---

<sup>14</sup> *See 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* [Docket No. 180] (the "Bidding Procedures Order").

*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* [Docket No. 377] (the “Sale Order”).

36. Paragraph 33 of the Sale Order provided for an amended Assumption Notice procedure that was identical to the procedure outlined in the Bidding Procedures Order and requested in the Debtors’ Bidding Procedures Motion:

The Debtors are authorized to amend the Assumption Notice by adding or deleting Desired 365 Contracts at any time prior to the Closing; provided, however, that counterparties to any such added 365 Contracts shall have at least five (5) calendar days from the date of mailing or ECF notification, as applicable, of the amended Assumption Notice to properly object to the assumption and assignment of their respective Desired 365 Contract and rights thereunder and the applicable Cure Amount.

*Compare* Sale Order, ¶ 33 with Bidding Procedures Order, ¶ 12 and Bidding Procedures Motion, ¶ 35(b).

37. On January 22, 2016, the Debtors filed a *Supplemental Notice of Possible Assumption and Assignment of Executory Contracts and Unexpired Leases* [Docket No. 391] (the “Supplemental Notice”). The Supplemental Notice stated, in bold lettering: **“You are receiving this notice because you are identified as a party to one or more Added Desired 365 Contracts that may be assumed by the Debtors and assigned to the buyer pursuant to the Sale Order.”** See Supplemental Notice, at 2 (emphasis in original). Consistent with paragraph 33 of the Sale Order, the Debtors set a January 27, 2016 objection deadline. See *id.* The Debtors served WesternGeco with the Supplemental Notice on January 22, 2016. See *Certificate of Service* [Docket No. 396].

38. The Chapter 11 Cases closed and the effective date occurred on February 1, 2016.<sup>15</sup> Upstream is the entity operating the Debtors' purchased assets.

39. On February 11, 2016, more than two weeks after the Court-authorized deadline, WesternGeco filed an untimely objection to the Supplemental Notice. *See Late-Filed Objection of WesternGeco, L.L.C.* [Docket No. 417] (the "Late Objection"). WesternGeco claimed: "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." *Id.* at ¶ 22.

40. Fifteen days later, WesternGeco filed this Motion, claiming "the only notice ever provided to WesternGeco of this bankruptcy proceeding was the January 22, 2016 Supplemental Notice . . . ." *See* Motion, ¶ 24.

### Argument

#### **I. The Court Should Deny the Motion as an Improper Collateral Attack on the Sale Order.**

41. WesternGeco's Motion is an improper collateral attack on the Sale Order.

42. WesternGeco states that, on the morning of January 28, the Supplemental Notice was "delivered" to someone "in a position to read, analyze and recognize the significance." *See* Motion, ¶ 17. Instead of making a prompt and brief record of its objection, which would have allowed all parties to evaluate and respond before the effective date, WesternGeco waited 14 days from January 28 to file its Late Objection and *another* 15 days to file the Motion.

---

<sup>15</sup> *See Notice of Entry of Confirmation Order and Occurrence of Effective Date Under Second Amended Joint Plan of Liquidating Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 410] ("Notice of Effective Date").

43. WesternGeco concedes that the Sale Order is a final order. *See* Motion, ¶ 20. Accordingly, after failing to timely object to the Supplemental Notice, WesternGeco's sole remedy was to file a timely appeal of the Sale Order.

44. Bankruptcy Rule 8002(a)(1) provides that appeals "must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed." *See* Fed. R. Bankr. P. 8002(a)(1). The time to appeal is extended when a party files "for relief under Rule 9024 *if the motion is filed within 14 days after the judgment is entered.*" *See* Fed. R. Bankr. P. 8002(b)(1)(D) (emphasis added).

45. While WesternGeco seeks relief under Rule 9024, it failed to do so within 14 days of the second of two judgments from which it seeks relief, the Sale Order. The Court entered the Sale Order on January 19. The 14-day period to respond expired on February 2. WesternGeco waited until February 11 to file its Late Objection and waited until February 26 to file the Motion.

46. Accordingly, the Court should deny the Motion because it is an improper collateral attack on the Sale Order.

**II. Nothing in Rule 60(b) Relieves WesternGeco from Its Failure to Timely Participate in the Chapter 11 Cases.**

**A. The Debtors Complied with the Fifth Circuit's Notice Requirements for Contract Assumption in Connection with A Plan.**

47. Even if the Court considered the Motion, Rule 60(b) does not provide WesternGeco with any relief.

48. The due process standard is undisputed. Notice must be "reasonably calculated, under all the circumstances, to apprise [parties] of the pendency of the action and afford [them] an opportunity to present [their] objections." *In re Sam*, 894 F.2d 778, 781 (5th Cir. 1990) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

49. In *In re National Gypsum Company*, the Fifth Circuit held that where a debtor seeks to assume an executory contract in connection with its plan, a debtor's notice obligation is "to assure that the non-debtor party was on notice of the debtor's specific intent to assume the contract." 208 F.3d 498, 505, n.5, 513 (5th Cir. 2000) (adding that, in contrast to cases where debtors assume executory contracts by motion, "the Bankruptcy Code sets forth a scheme in which the debtor maintains almost exclusive control over the timing of its decision on assumption or rejection to ensure that its decision contributes to a workable plan of reorganization"). "Unless there is a showing that the non-debtor possessed actual knowledge of a sufficiently refined degree, the debtor must demonstrate delivery of the proposed plan of reorganization or some other court-ordered notice that set forth [the debtor's] intent to assume the [contract]." *See id.* at 513.

50. *First*, the Debtors' notice to Western Geco satisfied both the Debtors' obligations under *In re Gypsum* and the procedures established by this Court. The Debtors gave WesternGeco specific notice of their intent to assume the license: "**You are receiving this notice because you are identified as a party to one or more Added Desired 365 Contracts that may be assumed by the Debtors and assigned to the buyer pursuant to the Sale Order.**" *See* Supplemental Notice, at 2 (emphasis in original). And, as approved by the Court, the Debtors served WesternGeco by U.S. Mail (first class) on January 22, 2016, in the manner and within the time required under the Sale Order. *See Certificate of Service* [Docket No. 396].

51. Additionally, the Supplemental Notice merely used a mechanism approved in the Bidding Procedures Order. Since early December, WesternGeco and its parent, Schlumberger Technology Corporation, were both on notice of this mechanism and the January 11, 2016, sale objection deadline. *See Certificate of Service* [Docket No. 212]; *Notice of Transaction* [Docket No. 190].

52. *Second*, even if WesternGeco never received the Supplemental Notice—which it concedes that it did—the record reflects that WesternGeco possessed the requisite actual knowledge of the bankruptcy proceedings and impending license assumption. WesternGeco engaged in behind-the-scenes business negotiations based on the position that the licenses would be transferred to Upstream. In the January 18, 2016 email, Larry Galloway stated that “As requested, GPI/WG will be willing to offer Upstream Exploration LLC the opportunity to license portions of data previously licensed by Century Offshore, Inc. . . .” Wojna Decl., Ex. G. Mr. Galloway followed up on February 1, 2016, asking, “Did you guys complete your transaction?” *Id.*

53. Further, the Debtors provided notice throughout the Chapter 11 Cases to WesternGeco and its parent, Schlumberger Technology Corporation. *See e.g., Certificate of Service* [Docket No. 212]. The Debtors provided both WesternGeco and Schlumberger Technology Corporation with the “Notice of Transaction” that specifically referenced the Bidding Procedures Motion and Bidding Procedures Order, both of which included the five-calendar-day supplemental notice mechanism, and that specified the January 11, 2016, sale objection deadline.

**B. WesternGeco’s Strained Arguments Rely on Inapplicable Authorities.**

54. Ignoring the standard from *In re Gypsum*, WesternGeco relies on inapposite cases about creditor bar dates and a debtor’s obligation when it assumes a contract *by motion*. WesternGeco also relies on a series of notice requirements from the Bankruptcy Rules and procedures governing motions before this Court. *See* Fed. R. Bankr. P 2002(a)(2), 6004(c), 6006, 9006(d), and 9014(b); Bankruptcy Local Rule 9013-1; and *Order Granting Complex Chapter 11 Bankruptcy Case Treatment* [Docket No. 43]. Under any applicable standard, the notice provided to WesternGeco was sufficient.

55. As an initial matter, the rules on which WesternGeco rely apply to motions only. The Supplemental Notice was not a motion: it was not a motion to sell property and it was not a motion to assign an executory contract. The Bidding Procedures Motion, however, was such a motion. In December 2015, WesternGeco and its parent both received notice of the sale hearing. *See Certificate of Service* [Docket No. 212] (certifying service of Notice of Transaction).

56. Moreover, even if the Supplemental Notice were a motion—which it is not—Bankruptcy Rule 9006 is clear that the Court may modify by order any of the time periods cited by WesternGeco. And the Court did so when it approved the five-day notice period for the Supplemental Notice under the Bidding Procedures Order. *See Bidding Procedures Order* ¶ 12. As a result, WesternGeco’s assertion that the Debtors or Upstream somehow violated any provision of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, or any order of the Court is plainly wrong.

**C. Accounting for All Relevant Circumstances, Relief Under Rule 60(b)(4) Would Not Be Equitable.**

57. WesternGeco’s failure to participate in the Chapter 11 Cases in a timely fashion was not the result of excusable neglect, and it was not inadvertent.

58. Determining whether a party’s neglect is excusable is a fact-specific inquiry. “[T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993). “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.” *Id.*

59. The relevant circumstances demonstrate that WesternGeco is a sorry candidate for equitable relief. Here:

- (a) in the context of an out-of-court restructuring, WesternGeco gave “written assurance (via this email) that we will not seek any additional compensation or terminate Century’s Data licenses as a result of these changes”;
- (b) when the Debtors entered bankruptcy, WesternGeco negotiated license transfer fees with the Debtors’ lay representatives, who were unaware of the proscription on such fees under section 365 of the Bankruptcy Code; and
- (c) while WesternGeco disclaimed notice, it is clear that it and its parent had actual knowledge about the Chapter 11 Cases, including notice of the Bidding Procedures Motion and Bidding Procedures Order, both of which included the five-calendar-day supplemental notice mechanism and specified the January 11, 2016, sale objection deadline..

60. The path chosen by WesternGeco—moving to *vacate* the Sale Order and Bidding Procedures Order—would have significant potential impact on the judicial proceedings. Worse, there is no excuse for the delay. WesternGeco states that on the morning of January 28, the Supplemental Notice was “delivered” to someone “in a position to read, analyze and recognize the significance.” *See* Motion, ¶ 17. Instead of making a prompt and brief record of its objection, which would have allowed all parties to evaluate and respond before the Effective Date, WesternGeco waited 14 days from January 28 to file its Late Objection and *another* 15 days to file the Motion. Now, nearly two months after the Debtors emerged from bankruptcy, Upstream is forced to defend a costly collateral attack on the Chapter 11 Cases.

61. Finally, the record reflects that WesternGeco’s conduct prior to and during the Chapter 11 Cases was anything but inadvertent. WesternGeco hung in the shadows of this Chapter 11 Cases, hoping to quietly extract millions of dollars in license transfer fees from a nearly administratively insolvent estate. The amounts being negotiated would have exceeded the aggregate recovery of all unsecured creditors in the Chapter 11 Cases. Fortunately, before it was

too late, representatives of the Debtors realized that WesternGeco was attempting to extract licensing fees that need not be paid and, accordingly, stopped discussions with WesternGeco.

**III. Even If the Court Granted the Motion to Vacate, WesternGeco Is Not Entitled to Substantive Relief Because Seismic Data Licenses Are Not Subject to Copyright Protection.**

62. If the Court granted the Motion, WesternGeco nevertheless would face insurmountable substantive hurdles in opposing assumption and assignment of its licenses. Notwithstanding WesternGeco's assertions, section 365(c)(1) of the Bankruptcy Code does not prohibit the assumption and assignment of the seismic data licenses. WesternGeco does not cite a single case where any court has found that seismic data is subject to copyright protection, nor is Upstream aware of one. At least one court has dismissed WesternGeco's argument. *See In re Virgin Offshore USA, Inc.*, 2013 WL 4854312, at \*3-4 (E.D. La. Sept. 10, 2013) (affirming bankruptcy court order authorizing assumption of master license agreement of seismic data over licensor's objection and noting "a significant lack of affirmative support for" the "novel argument" that seismic data licenses are subject to copyright protection).

63. In fact, in various disputes about protections provided to seismic data, the Fifth Circuit and other courts consider such data to be trade secrets. *See, e.g., Musser Davis Land Co. v. Union Pac. Res.*, 201 F.3d 561, 569 (5th Cir. 2000) ("That a mineral lessee or permittee ordinarily acquires a valuable exclusive property right in data derived from its geophysical survey has been confirmed by criminal and civil litigation involving the misappropriation and right to sell such data."); *Anadarko Petroleum Corp. v. Davis*, 2006 WL 3837518, at \*15 (S.D.T.X. Dec. 28, 2006) ("This court finds that Anadarko has shown a probability of success in proving that its reserve report and RockPilot images are entitled to trade secret protection."); *In re Bass*, 113 S.W.3d 735, 740, 742 (Tex. 2003) (holding that "seismic data and its interpretations are trade secrets" for purposes of the Texas Rules of Evidence and stating "It is undisputed that

the oil and gas industry typically treats seismic data and other methods for obtaining subsurface geological information as trade secrets”).

64. The Motion seeks authority to pursue relief that would be the difference between liquidation and reorganization for many companies in this highly distressed industry. If section 365(c)(1) prohibited the assumption and assignment of seismic data licenses and if exploration and production companies were required to pay multiples for the same data, companies like the Debtors—who spend many hours and millions of dollars reprocessing seismic data to the point where the licensed data and the company’s proprietary analysis are inextricable—would face substantial hurdles to a successful restructuring.

65. In sum, the Motion seeks authority to pursue an unsupported, futile, and inequitable legal theory.

### **Conclusion**

66. For the reasons set forth above, the Court should deny WesternGeco’s Motion.

Dated: March 18, 2016

Respectfully Submitted,

*/s/ Zack A. Clement*

---

Zack A. Clement (TX Bar No. 04361550)

**ZACK A. CLEMENT PLLC**

3753 Drummond

Houston, Texas 77025

Telephone: (832) 274-7629

Email: zack.clement@icloud.com

*Counsel to Upstream Exploration LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing *Upstream Exploration LLC's Response to 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]* was filed electronically on this 18th day of March, 2016.

*/s/ Zack A. Clement*  
\_\_\_\_\_  
Zack A. Clement