

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION**

<b>In re:</b>	)	
	)	
<b>O&amp;G LEASING, LLC,</b>	)	<b>Case No. 10-01851 EE</b>
<b>PERFORMANCE DRILLING COMPANY, LLC</b>	)	<b>Case No. 10-01852 EE</b>
	)	<b>Chapter 11</b>
<b>Debtors</b>	)	<b>Jointly Administered</b>

**OBJECTION OF FIRST SECURITY BANK AS INDENTURE TRUSTEE TO  
MOTION TO APPROVE AGREED ORDER RESOLVING WASHINGTON STATE  
BANK'S MOTION FOR ABANDONMENT AND REQUEST FOR TERMINATION OF  
§362 AUTOMATIC STAY OR, IN THE ALTERNATIVE, MOTION FOR ADEQUATE  
PROTECTION AND RESOLVING USE OF CASH COLLATERAL  
AND OTHER PENDING MATTERS**

[Dkt. # 561]

First Security Bank as Indenture Trustee (“FSB” or “Indenture Trustee”) on behalf of all Holders of the Senior Series 2009A Debentures (the “Senior Debentures”) issued by O&G Leasing, LLC (“O&G”) and of the Series 2009B Debentures (“Subordinated Debentures”) also issued by O&G (collectively, the “Debentures”) respectfully objects to the *Motion to Approve Agreed Order Resolving Washington State Bank’s Motion for Abandonment and Request for Termination of §362 Automatic Stay or, in the Alternative, Motion for Adequate Protection and Resolving Use of Cash Collateral and Other Pending Matters* [Dkt. # 561] (the “WSB Motion”) for the reasons set forth below.

## EXECUTIVE SUMMARY OF OBJECTION

1. The proposed settlement between the Debtors and Washington State Bank, while perhaps being fair between the parties, unfairly discriminates vis-à-vis the Indenture Trustee. The proposed settlement of the Debtors with Washington State Bank (“WSB”) clearly treats

WSB better than another similarly situated creditor, i.e., the Indenture Trustee for the benefit of the holders of the Senior Debentures. As a result, this proposed settlement does not satisfy the fair and equitable test, and therefore should not be approved.

### **GENERAL OVERVIEW OF OBJECTION**

2. There is no question that a basic policy in bankruptcy cases is that settlements and compromise are favored in bankruptcy. 10 Lawrence P. King, *Collier on Bankruptcy*, ¶ 9019.01 at 9019-2 (15<sup>th</sup> ed. Revised 2005). Nevertheless, there are limits imposed on settlements. To be approved, a compromise must be both “fair and equitable” and “in the best interests of the estate.” *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); *Official Comm. of Unsecured Creditors v. Cajun Electric Power Coop., Inc.*, 119 F.3d 349, 355 (5<sup>th</sup> Cir. 1997). The Trustee [or Debtor in Possession], as the proponent of the proposed settlement, has the burden of persuasion. *See, e.g. In re High Tech Packaging, Inc.*, 397 B.R. 369, 372 (Bankr. N.D. Ohio 2008).

3. Generally, the decision about whether to approve a particular compromise lies within the discretion of the trial judge. That discretion, however, is more limited in the context of a reorganization case. With regard to approval of compromises that form part of a plan of reorganization, an even more definite rule limits the exercise of discretion. A court may approve such a compromise or settlement only when it is “fair and equitable.” *TMT*, 390 U.S. at 424, 88 S.Ct. at 1163, 20 L.Ed.2d 1.

4. In the context of a reorganization case, the Court must look beyond only whether a proposed settlement is fair between the debtor and the settling creditor. Even if a settlement is fair and equitable as between the parties to the settlement, the Court should not approve a settlement if the rights of others in the reorganization case who are not parties to the settlement

will be unduly prejudiced. As the Court in *In re Masters Mates and Pilots Pension Plan*, 957 F.2d 1020, 1026 (2d Cir.1992) noted, “We must determine that ‘no one has been set apart for unfair treatment.’” If a Court, in determining whether a settlement is fair and equitable, looks only to the fairness of the settlement as between the debtor and the settling claimant [and ignores third-party rights], it contravenes a basic notion of fairness. *In re Arter & Hadden, LLP*, 373 B.R. 31, 36 (Bankr. N.D. Ohio 2007), citing *In re AWECO*, 725 F.2d 293, 298 (5<sup>th</sup> Cir. 1984).

### SPECIFIC OBJECTIONS

5. Both the Indenture Trustee and WSB hold the same type of primary collateral – drilling rigs (among other things). The following chart shows the five drilling rigs that the Debtors own:

Rig #	22	48	3	14	28
Description	HRI 800 Heartland	HRI 800 Heartland	HRI 800 Heartland	Oil Rig 1000 Full Circle	Gardner-Denver 1100 Full Circle
Horsepower	1,000	1,000	1,000	1,200	1,500
Depth-TMD (Feet)	12,500	12,500	12,500	15,000	18-20,000
Drill Pipe	4 ½”	4 ½”	4 ½”	4 ½”	5”
First Mobilized	November 2006	March 2007	September 2007	June 2008	December 2008
Total Cost	\$ 7,267,000	\$ 7,162,000	\$ 8,171,000	\$7 ,846,000	\$12,527,000
Secured Creditor	FSB	WSB/FSB	FSB	FSB	FSB

6. The loans of both WSB and the Indenture Trustee to the Debtors were short-term debts to be repaid in full in only four years. The indebtedness owed to WSB was evidenced by a Promissory Note dated December 5, 2008, and that Note was to mature on December 5, 2012. [See Dkt. #434-1, Ex. A]. The indebtedness owed to the Indenture Trustee was evidenced by certain debentures dated September 15, 2009 that were to mature on September 15, 2013. [See Dkt. #34-21, Ex. J-1].

7. Under the proposed Settlement, WSB has an allowed secured claim in the amount of \$4,504,177.00, which is secured by a first, perfected security interest in Rig No. 48. As shown in the chart, Rig No. 48 is one of the three smaller 1,000 horsepower rigs of the Debtors. Its cost was the lowest of all five of the Debtors' rigs. On information and belief, Rig No. 48 generates the lowest amount of revenues for the Debtors.

8. Under the proposed settlement with WSB, the Debtors propose to pay interest on the allowed secured claim from and after the entry of the Agreed Order of \$4,504,177.00 at the rate of NY Prime +2% with a floor of 6% and a ceiling of 8%. Furthermore, under the proposed settlement with WSB, beginning with collections received in September 2011, the Debtors propose to pay WSB the higher of (a) a fixed monthly payment of \$35,000 or (b) a "Calculated Upper End Payment." The Calculated Upper End Payment is 25% of the Gross Revenue generated by Rig No. 48. All of the payments received (if less than \$72,000 per month) are to be applied to WSB's allowed secured claim.

9. The Indenture Trustee holds a first, perfected security interest in the other four rigs, and holds a second, perfected security interest in Rig No. 48, all of which secure Senior Debentures in the principal amount of \$25,955,000 and Subordinated Debentures in the principal amount of \$7,610,000, or a total principal indebtedness for the Senior Debentures and Subordinated Debentures of \$33,565,000.

10. If WSB is to receive \$35,000 per month from the date of the entry of the Agreed Order as interim adequate protection payments for just one rig (which was the least expensive to construct and which is one of the three smallest rigs), then the Indenture Trustee, which holds a first security interest on the other four rigs, ought to receive (based on a minimum payment of

\$35,000-per-rig adequate protection payment), an adequate protection payment of at least four times that of WSB, or a minimum of \$140,000 per month.

11. If the adequate protection payment is based on the 25% of Gross Revenues for its collateral (Rig No. 48) that WSB is to receive, the Indenture Trustee is entitled to adequate protection payments of 25% of the Gross Revenues generated by Rig Nos. 22, 3, 14 and 28, which amount would be substantially greater than the \$140,000 per month minimum payment.

12. If the adequate protection payment were based on a ratio of the indebtedness owed, the amount of the Senior Debentures principal indebtedness owed to the Indenture Trustee is approximately 5.762 times the indebtedness owed to WSB and the total principal indebtedness is approximately 7.452 times the principal indebtedness owed to WSB. Accordingly, if WSB is entitled to interim adequate protection payments on the basis of the ratio of the indebtednesses, the Indenture Trustee would be entitled to a minimum payment of \$201,685.01 per month based on just the principal Senior Debenture indebtedness and \$260,820 per month based on the total principal debenture indebtedness.

13. If one used the \$72,000 per month figure for WSB (based on 25% of Gross Revenues for Rig No. 48), then the Indenture Trustee would be entitled to a payment of \$414,864 per month based on the principal Senior Debenture indebtedness and \$536,544 per month based on the total debenture indebtedness.

14. Given the Debtors' cost to operate Rig No. 48, it may be that for the Debtors to pay WSB 25% of the Gross Revenues generated by that rig cause the Debtors to have to use a portion of the cash collateral of the Indenture Trustee either to fund a disproportionate share of the operating expenses or to use a portion of the cash collateral of the Indenture Trustee to make such payments to WSB, and to both of which the Indenture Trustee objects.

15. The fact that the Debtors contend that these proposed payments are advanced treatment under the Plan rather than interim adequate protection payments is irrelevant. There is no reasonable basis, using any standard of comparison, to justify the significantly better treatment to be given to WSB than to the Indenture Trustee. Regardless of what the payments are called, the Debtors may not unfairly discriminate in favor of WSB and against the Indenture Trustee (whether in the form of interim adequate protection payments or advanced payments under a yet-to-be-confirmed Plan).

16. Despite the substantial similar claims and collateral of WSB and the Indenture Trustee, the Debtors have proposed substantially different treatment insofar as the “adequate protection payments” they have offered to WSB and to the Indenture Trustee. While the proposed treatment for the WSB claim is set forth in paragraph 9 above, the Debtors, however, have not offered any adequate protection payments for the claim of the Indenture Trustee. Although the Court established a Debt Reserve Account into which the Debtors have deposited \$65,000 per month (just a fraction on any proportionate basis of the proposed payment to WSB), the Debtors have opposed the motion of the Indenture Trustee to be paid even those funds. This disparate treatment is impermissible, and therefore the proposed settlement should not be approved.

WHEREFORE, First Security Bank as Indenture Trustee respectfully requests the Court to deny the proposed settlement between the Debtors and WSB, whether denominated as adequate protection payments or as payments in advance of the confirmation of a Plan.

This, the 25th day of October, 2011.

Respectfully submitted,

**FIRST SECURITY BANK, INDENTURE TRUSTEE**

By: /s/ Stephen W. Rosenblatt

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**CERTIFICATE OF SERVICE**

I certify that the foregoing pleading was filed electronically through the Court's ECF system and that it was served electronically on all parties enlisted to receive service electronically, including the following persons:

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SO CERTIFIED, this the 25th day of October, 2011.

/s/ Stephen W. Rosenblatt

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