

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE: § CHAPTER 11
§
SHERWIN ALUMINA COMPANY, LLC, § Case No. 16-20012
et al.,¹ §
DEBTORS. § (Joint Administration Requested)

LIMITED OBJECTION OF CHENIERE ENERGY, INC., ET AL. TO (I) MOTION OF SHERWIN ALUMINA COMPANY, LLC ET. AL., FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO ENTER INTO AND PERFORM UNDER THE STALKING HORSE PURCHASE AGREEMENT AND FOR RELATED RELIEF AND (II) EMERGENCY MOTION OF SHERWIN ALUMINA COMPANY, LLC, ET AL., FOR ENTRY OF AN ORDER AUTHORIZING DEBTORS TO OBTAIN POSTPETITION SECURED FINANCING AND UTILIZE CASH COLLATERAL

Cheniere Energy, Inc., et al., (“Cheniere”), a party in interest in the above-captioned bankruptcy case, files this limited objection to the *Motion of Sherwin Alumina Company, LLC, et al., for Entry of an Order (A) Authorizing the Debtors to Enter Into and Perform Under the Stalking Horse Purchase Agreement, (B) Approving Bidding Procedures, (C) Approving Contract Assignment Procedures, (D) Approving Bid Protections, (E) Scheduling Bid Deadlines and an Auction, and (F) Approving the Form and Manner of Notice Thereof*, (hereinafter the “**Stalking Horse Motion**”) and *Emergency Motion of Sherwin Alumina Company, LLC, et al., for Entry of Interim and Final Orders (I) Authorizing Debtors to (A) Obtain Postpetition Secured Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Lender, (IV) Modifying the Automatic Stay, and (V) Scheduling a Permanent Finance Hearing Pursuant to Sections 105, 361, 362, 363, 364, and 507 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, and 9014*, (the “**DIP Motion**”) and respectfully states as follows:

¹ The debtors in these chapter 11 cases, along with the last four digits of each debtor’s federal tax identification number, are: Sherwin Alumina Company, LLC (2376) and Sherwin Pipeline, Inc. (9047). The debtors’ service address is: 4633 Highway 361, Gregory, Texas 78359.



Background

1. Debtor Sherwin Alumina Company, LLC (“**Sherwin**”) owns and operates a commercial property in Corpus Christi, Texas adjacent to property owned and operated by Cheniere. Cheniere is developing a Liquefied Natural Gas Facility (“**LNG Facility**”) on its property.

2. In connection with the development of the LNG Facility, Sherwin has granted to Cheniere various property interests, including restrictive covenants and easements, through certain real property agreements (the “**Real Property and Easement Interests**”), contracts and a lease dated January 19, 2015 (the “**Lunchbox Lease**”) (collectively, the “**Cheniere Property Interests**”) over tracts of Sherwin land adjacent to the Cheniere property (the “**Debtor Real Property**”) owned by Sherwin Alumina Company, LLC and Sherwin Pipeline, Inc. Each of the Real Property and Easement Interests were duly and properly recorded in San Patricio County, Texas in accordance with Texas law (other than one easement, dated December 11, 2015 (the “**Powerline Easement**”) that was duly executed, notarized and delivered by Sherwin but has yet to be recorded). By their terms, the Real Property and Easement Interests “run with the land.” The Cheniere Property Interests are set forth in Exhibit A.

3. Specifically, the Cheniere Property Interests include a number of property rights in favor of Cheniere including, inter alia, usage rights over the Debtor Real Property necessary for the construction, operation and maintenance of the LNG Facility, including necessary rights of emergency access, pipeline placement, drainage, and building restrictions necessary for regulatory compliance. Cheniere has relied on the granting of the Cheniere Property Interests over the Debtor Real Property, and the continued access to the property rights associated therewith in connection with its development of the LNG Facility.

Basis for Objection

4. Importantly, Cheniere does not generally object to the sale process (or the sale of the Debtor Real Property), the Debtor in Possession financing (the “**DIP Financing**”) or the Debtors use of cash collateral (the “**Cash Collateral**”). Rather, Cheniere seeks only to protect its valid interests by ensuring that any sale or encumbrance of the Debtor Real Property (including in connection with the DIP Financing or Cash Collateral) remains subject and, as applicable, subordinate to the Cheniere Property Interests.

A. Real Property and Easement Interests

5. Each of the Real Property and Easement Interests has been validly created in accordance with Texas law. Tex. Prop. Code § 13.001.² Cheniere thus objects to any sale which purports to be free and clear of the Real Property and Easement Interests. As noted in paragraph 2, the Real Property and Easement Interests “run with the land” and therefore, the interests constitute property interests under Texas law. *In re Energytec, Inc.*, 739 F.3d 215, 221 (5th Cir. 2013). Accordingly, the Real Property and Easement Interests cannot be vitiated by a free and clear sale pursuant to Section 363(f) of the Bankruptcy Code. The Debtors cannot satisfy *any* of the applicable requirements of Sections 363(f)(1)-(5) that permit the Debtors to sell their assets free and clear of such interests. Specifically, a sale of the Debtor Real Property “free and clear” of the Real Property and Easement Interests is prevented by Section 363(f)(1) because the applicable non-bankruptcy law would prohibit such sale. *See, e.g.*, 11 U.S. 363(f)(1); Tex. Prop. Code § 13.001; *see also Hidalgo & Cameron Counties Water Control & Improvement Dist. No. 9 v. Maverick County Water Control & Improvement Dist. No. 1*, 349 S.W.2d 768 (Tex. Civ.

² With regard to the Powerline Easement, under Texas Law bona-fide purchasers are subject to pre-existing property interests of which they are on at least inquiry or constructive notice. Tex. Prop. Code § 13.001; *Williams v. Jennings*, 755 S.W.2d 874, 881 (Tex.App.- Houston 1988)(noting that under Texas law, a “bona fide purchaser is one who acquires legal title to property in good faith for a valuable consideration without ... notice of an infirmity in the title.”); *Matter of Hamilton*, 125 F.3d 292, 298-302 (5th Cir. 1997)(notice may be actual, constructive or inquiry); *In re Tilton*, 297 B.R. 478, 482-485 (Bankr. E.D. Tex. 2003)(same).

App. – San Antonio, 1961); *McWhorter v. City of Jacksonville*, 694 S.W.2d 182 (Tex. Civ. App. – Tyler, 1985) (sales of real property remain subject to restrictive covenants which run with the land under Tex. Prop. Code § 13.001 and to which parties had actual, constructive or inquiry notice). Section 363(f)(2) does not apply here, as Cheniere does not consent to the proposed sale to the extent set forth herein. Sections 363(f)(3)-(5) of the Bankruptcy Code are also clearly not applicable to the facts here because the Real Property and Easement Interests are not a lien, not in bona fide dispute, and Cheniere could not be compelled to accept a money satisfaction of its Real Property and Easement Interests.

6. Additionally, Cheniere similarly objects to the final motion for DIP Financing and Cash Collateral to the extent that the Real Property and Easement Interests are not treated as permitted encumbrances under the terms of the financing. Given that the Real Property and Easement Interests are interests in real property, the Debtors are incapable of adequately protecting Cheniere if the liens granted to the DIP lenders (the “**DIP Liens**”) or liens granted pursuant to Debtors use of cash collateral (the “**Replacement Liens**”) were to “prime” the Real Property and Easement Interests as required by Section 361 of the Bankruptcy Code.

B. The Lunchbox Lease

7. The Lunchbox Lease is an unexpired lease of real property that is subject to rejection or assumption by the Debtors pursuant to Section 365 of the Bankruptcy Code. Section 365(h) of the Bankruptcy Code provides that “the lessee may retain its rights under such lease (including rights such as those relating to . . . possession, . . . for the balance of the term.” Given the protection afforded under Section 365(h), the Debtors cannot be permitted to eviscerate Cheniere’s rights under the Lunchbox Lease by purporting to sell the Debtor Real Property “free and clear” of the lease. Instead, any purchaser of the Debtor Real Property only may acquire the property subject to (i) to the Lunchbox Lease, if the Debtors elect, and are authorized by the

Court to assume the lease, or (ii) Cheniere's rights under 365(h) of the Bankruptcy Code as they relate to the Lunchbox Lease, if the Debtors elect, and are authorized by the Court, to reject the lease.

8. The Debtor Real Property remains subject to the lease and, for the same reason as set forth in paragraph 6 above, such real property is not permitted to be sold free and clear of the Lunchbox Lease under Sections 363(f)(1)-(5). Consistent with the 7th Circuit's approach in *In re Qualitech*, where a tenant under an unexpired lease of real property timely objects to a Section 363 sale—as Cheniere does herein—the Debtor must be prevented from selling its real property interest free and clear of the leasehold unless one of the exceptions enumerated in Sections 363(1)-(5) applies and as described above, none apply. *Precision Indust., Inc. v. Qualitech Steel SBQ, LLC. (In re Qualitech Steel Corp.)* 327 F.3d 537 (7th Cir. 2003).

9. Additionally, Cheniere objects to the final motion for DIP Financing and Cash Collateral to the extent that the Lunchbox Lease is not treated as a permitted encumbrance under the terms of the financing. The Lunchbox Lease is an interest in real property—and the particular protection afforded by Section 365(h) of the Bankruptcy Code to leaseholders, the Debtors' are incapable of adequately protecting Cheniere if the DIP Liens or Replacement Liens were to "prime" the Lunchbox Lease, as required by Section 361 of the Bankruptcy Code.

Relief Requested and Reservation of Rights

10. To the extent that the Court is inclined to approve the DIP Financing, the use of Cash Collateral or enters an order permitting performance under the Stalking Horse Motion, Cheniere requests that the Court clarify in the corresponding order that neither the DIP Liens nor Replacement Liens may prime Cheniere's interests, and that any sale remains subject to Cheniere's Real Property and Easement Interests.

11. Cheniere hereby reserves all of its rights with respect to the Lunchbox Lease, including its rights under Section 363(h) of the Bankruptcy Code in the event that Debtors seek to reject the lease. To the extent that the Court approves the DIP Financing or Cash Collateral, or enters an order permitting performance under the Stalking Horse Motion, Cheniere respectfully requests that the Court clarify in the corresponding order that neither the DIP Liens nor Replacement Liens may prime Cheniere's interest in the leasehold and that any sale remains subject to Cheniere's Lunchbox Lease. Cheniere also reserves the right to object to the Debtors' treatment of the lease in subsequent filings.

12. Cheniere reserves its right to modify and supplement this objection and reservation of rights as appropriate.

Dated February 19, 2016

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CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing was served by electronic transmission through the Clerk's Office ECF noticing facilities upon all registered ECF users appearing in this case on February 19, 2016.

/s/Edward Ripley

Edward Ripley

EXHIBIT A

List of Cheniere Property Interests

1. Easement Agreement for Power Line Access, dated December 11, 2015 between Sherwin Alumina L.P. and Corpus Christi Liquefaction, LLC.
2. Utility Easement Agreement, dated August 9, 2005, between Sherwin Alumina L.P. and Corpus Christi LNG, LP.
3. Bay Drainage Easement Agreement, dated August 9, 2005, between Sherwin Alumina L.P. and Corpus Christi LNG, LP.
4. Access Easement Agreement, dated December 8, 2003, between Sherwin Alumina L.P. and Corpus Christi LNG, LP,
5. Dredge and Transit Easement Agreement, dated January 29, 2015, between Sherwin Alumina LLC. and Corpus Christi Liquefaction, LLC.
6. Dredge Material Disposal Pipeline Easement Agreement, dated January 29, 2015, between Sherwin Alumina LLC and Corpus Christi Liquefaction, LLC.
7. Emergency Access Agreement, dated January 29, 2015, between Sherwin Alumina LLC and Corpus Christi Liquefaction, LLC.
8. Pipeline, Utility and Access Easement Agreement, dated January 29, 2015, between Sherwin Alumina LLC and Corpus Christi Liquefaction, LLC.
9. Easement Agreement, dated May 7, 2004, between Sherwin Alumina LP and Reynolds Metals Company (as later assigned).
10. East Ditch Easement Agreement, dated August 11, 2015, between Cheniere Land Holdings LLC and Reynolds Metals Company.
11. Easement Agreement, dated December 31, 2000, between BPU Reynolds Inc. and Reynolds Metals Company (as later assigned).
12. Exclusion Zone Agreement and Declaration of Restrictive Covenants, dated June 16, 2005, between Corpus Christi LNG, LP and Sherwin Alumina, LP
13. Amended and Restated Old Impoundment Services Agreement, date unknown, 2005, between Sherwin Alumina L.P. and Reynolds Metals Company.
14. Heavy Haul Road Access Agreement, dated January 29, 2005, between Corpus Christi Liquefaction, LLC and Sherwin Alumina Company, LC.
15. "Lunchbox Lease" Lease Agreement, dated January 29, 2015, between Sherwin Alumina Company LLC and Corpus Christi Liquefaction, LLC.