

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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 In re: : Chapter 11
 :
 EMERGE ENERGY SERVICES LP, *et al.*,¹ : Case No. 19-_____ (_____)
 :
 Debtors. : (Joint Administration Requested)
 :
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DEBTORS’ MOTION FOR ENTRY OF ORDERS UNDER 11 U.S.C. §§ 105(a), 363(b) AND 363(c) AND FED. R. BANKR. P. 6003 AND 6004 AUTHORIZING THE DEBTORS TO CONTINUE THEIR CUSTOMER PROGRAMS

The debtors and debtors-in-possession in the above-captioned cases (collectively, the “**Debtors**”) hereby file this motion (the “**Motion**”) for entry of interim and final orders, substantially in the forms attached hereto as Exhibit A and Exhibit B (respectively, the “**Interim Order**” and the “**Final Order**”), under sections 105(a), 363(b) and 363(c) of title 11 of the United States Code (the “**Bankruptcy Code**”) and, to the extent applicable, Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), authorizing the Debtors to continue their Customer Programs (as defined below). In support of the Motion, the Debtors rely upon and incorporate by reference the *Declaration of Bryan Gaston, Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings*, filed with the Court concurrently herewith (the “**Gaston Declaration**”).² In further support of the Motion, the Debtors, by and through their undersigned counsel, respectfully represent:

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Emerge Energy Services LP (2937), Emerge Energy Services GP LLC (4683), Emerge Energy Services Operating LLC (2511), Superior Silica Sands LLC (9889), and Emerge Energy Services Finance Corporation (9875). The Debtors’ address is 5600 Clearfork Main Street, Suite 400, Fort Worth, Texas 76109.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Gaston Declaration.



JURISDICTION

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a), 363(b) and 363(c) of the Bankruptcy Code. Such relief is warranted under Bankruptcy Rules 6003 and 6004.

BACKGROUND

2. On the date hereof (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court commencing cases for relief under chapter 11 of the Bankruptcy Code (the “**Chapter 11 Cases**”). The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the Gaston Declaration and is fully incorporated herein by reference.

3. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested in the Chapter 11 Cases, and no committees have yet been appointed.

4. Simultaneously with the filing of this Motion, the Debtors have filed a motion with this Court pursuant to Bankruptcy Rule 1015(b) seeking joint administration of the Chapter 11 Cases.

RELIEF REQUESTED

5. By this Motion, the Debtors request entry of the Interim Order and the Final Order, granting them authority, in their discretion, to continue, renew, replace, implement new and/or terminate their Customer Programs (as defined below) and any other customer practices

as they deem appropriate, without further application to the Court. For the avoidance of doubt, nothing herein shall impair the Debtors' rights to dispute the validity of any obligation that arises from a Customer Program.

BASIS FOR RELIEF

6. Before the Petition Date and in the ordinary course of their businesses, the Debtors established various programs with certain customers, as described in more detail in paragraphs 10-14 below (the "**Customer Programs**").

7. The Debtors seek authority, in their discretion, to continue the Customer Programs or implement new customer practices in the ordinary course of the Debtors' businesses as the Debtors deem necessary. As further described below, the Debtors do not have any unpaid prepetition obligations with respect to their Customer Programs.

8. The Debtors mine, process and distribute high-quality silica sand—a key input for the hydraulic fracturing of oil and natural gas wells. The Debtors supply the silica sand directly to their customers. The Debtors' goodwill and ongoing business relationships may erode if their customers perceive that the Debtors are unable or unwilling to fulfill the prepetition commitments they have made through the Customer Programs. If the Debtors are unable to preserve the loyalty of their customers, the Debtors' businesses would likely suffer material harm. It is essential that the Debtors retain their current customers throughout the Chapter 11 Cases. Continuing the Customer Programs will help to accomplish this goal by ensuring customer satisfaction and generating repeat business, which ultimately increases net revenue.

9. The following are general descriptions and examples of the Customer Programs.

A. Prepayments

10. The Debtors allow certain customers to prepay for silica sand at a discounted price (the "**Prepayment Program**"). Pursuant to the Prepayment Program, participating

customers are given the opportunity, at the start of each calendar quarter, to prepay for a specified tonnage of silica sand at a discounted rate. Charges for the prepaid amounts are then deducted from the invoices sent to the customer. This program reduces counterparty payment risk and helps the Debtors build strong business relationships with customers, which in turn increases the volume of the Debtors' sales. Without the Prepayment Program, the Debtors risk losing business and customers to competitors. While the Debtors do not believe that Court approval is required to continue the Prepayment Program, by this Motion the Debtors request authority to continue, renew, replace, modify, implement new and/or terminate such program, in their business judgment.

B. Guaranties

11. Under certain customer contracts, Debtor Superior Silica Sands LLC ("SSS") guarantees its supply of silica sand. SSS provides two types of Supply Guaranties, one pursuant to Take or Pay Agreements (the "Take or Pay Guaranty") and a second based on monthly obligations with customers (the "Monthly Guaranty" and, together with the Take or Pay Guaranty, the "Supply Guaranties"). Pursuant to the Supply Guaranties, in the event that SSS is unable to supply a customer with the amount of silica sand SSS is obligated to provide, it must issue credits to the customer.

12. Under the Take or Pay Guaranty, a customer agrees to purchase a minimum tonnage of sand from particular SSS basins and, in turn, SSS must be able to supply the minimum amount of sand required to be purchased from the specific basins. Pursuant to the Take or Pay Guaranty, if SSS does not produce or is unable to provide the minimum amount of sand required to be purchased, SSS must issue credits against the customer's outstanding accounts receivable. In order to receive any credits, the customer must provide SSS with evidence showing that the customer purchased the sand from a different supplier at a higher price

than the same sand sold by SSS. Upon satisfactory proof, SSS must issue the customer credits for the difference in price paid, up to a maximum dollar amount per ton of sand. Thus, for example, if a customer claimed it bought 20,000 tons of sand from another supplier due to a shortfall in production by SSS, at a price per ton that was \$5 above the price SSS charged for the same sand, SSS must issue a credit of \$100,000. As of the Petition Date, SSS has incurred no out-of-pocket cost as a result of the Take or Pay Guaranty and does not believe any outstanding amounts are due to customers.

13. Pursuant to the Monthly Guaranty, SSS is obligated to provide a specified tonnage of sand each month to its customers. In the event that SSS is unable to meet its monthly obligation, SSS must issue credits against the customer's outstanding accounts receivable. The amount of credits issued depends on: (i) the extra cost the customer expended to purchase sand from another supplier; (ii) the additional transportation cost, if any, that resulted from the customer having to purchase sand from a different supplier; and (iii) any other cost incurred by the customer as a result of the failure of SSS to fulfill the monthly obligation and/or delay in fulfilling the order. For example, if a customer claims a 20,000 ton shortfall and the customer purchases the 20,000 tons from a different supplier for an extra \$1 per ton, with an additional transportation cost of \$2 per ton and has other costs of \$20,000 due to the shortfall, SSS must credit the customer \$80,000. As of the Petition Date, SSS has incurred no out-of-pocket cost as a result of the Monthly Guaranty and does not believe any outstanding amounts are due to customers.

14. The Supply Guaranties provide an important source of certainty to the Debtors' customers and encourage the Debtors' customers to transact with the Debtors with confidence. In addition, the Take or Pay Guaranty includes a reciprocal obligation that ensures the relevant

customers will purchase a minimum tonnage of sand from the Debtors. If the Debtors were forced to discontinue these programs, particularly during the pendency of the Chapter 11 Cases, the Debtors' customer relationships and volume of business could be permanently harmed. While the Debtors do not believe that Court approval is required to continue the Supply Guaranties, by this Motion, the Debtors request authority to continue, renew, replace, implement new and/or terminate such programs, in their discretion.

APPLICABLE AUTHORITY

A. Section 363 of the Bankruptcy Code Supports the Continuation of the Customer Programs

15. Section 363(b)(1) of the Bankruptcy Code empowers the Court to allow a debtor to “use, sell, or lease, other than in the ordinary course of business, property of the estate[.]” 11 U.S.C. § 363(b)(1). Courts have indicated that the debtor's decisions to use, sell or lease assets outside the ordinary course of business must be based upon the sound business judgment of the debtor. *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (“In determining whether to authorize the use, sale or lease of property of the estate under this [Section 363(b)], courts require the debtor to show that a sound business purpose justifies such actions.”) (internal citations omitted); *see also In re Phx. Steel Corp.*, 82 B.R. 334, 335–36 (Bankr. D. Del. 1987) (requiring “good business reason” for use under section 363(b) of the Bankruptcy Code).

16. Courts emphasize that the business judgment rule is not an onerous standard and may be satisfied “as long as the proposed action *appears* to enhance the debtor's estate.” *Crystalin, LLC v. Selma Props. Inc. (In re Crystalin, LLC)*, 293 B.R. 455, 463-64 (B.A.P. 8th Cir. 2003) (emphasis in original, internal alterations and quotations omitted); *see also In re AbitibiBowater*, 418 B.R. 815, 831 (Bankr. D. Del. 2009) (the business judgment standard is “not

a difficult standard to satisfy”); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (“Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task.”). The business judgment rule “reflects the reality that corporate decisions are better left to those who are close to the facts and have the experience to weigh the significance of those facts in an increasingly complex business environment.” *Brown v. Ferro Corp.*, 763 F.2d 798, 800 n. 2 (6th Cir. 1985) (internal citations and quotations omitted). Moreover, “[b]ankruptcy courts should be no more willing to second guess competent, disinterested trustees and debtors-in-possession than other courts are willing to second guess competent, disinterested directors” because the “reorganization or liquidation of a distressed debtor requires as much, if not more, creativity and risk-taking as the management of a healthy entity.” *See In re Engman*, 331 B.R. 277, 299 (Bankr. W.D. Mich. 2005); *see also In re Food Barn Stores, Inc.*, 107 F.3d 558, 567 n.16 (8th Cir. 1997) (“[w]here the [debtor’s] request is not manifestly unreasonable or made in bad faith, the court should normally grant approval as long as the proposed action appears to enhance the debtor’s estate.”) (citing *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985)).

17. Finally, section 363(c) of the Bankruptcy Code authorizes a debtor in possession operating its business pursuant to Bankruptcy Code Section 1108 to “enter into transactions in the ordinary course of business without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.” 11 U.S.C. § 363(c)(1). Section 363 of the Bankruptcy Code is designed to allow a debtor “to continue its daily operations without excessive court or creditor oversight and protect[] secured creditors and others from dissipation of the estate’s assets.” *U.S. ex rel. Harrison v. Estate of Deutscher*, 115 B.R. 592, 599 (M.D. Tenn. 1990) (citations omitted); *see also In re Cook & Sons Mining, Inc.*, No. Civ.A. 05-19,

2005 WL 2386238, at *3 (E.D. Ky. Sept. 28, 2005) (“Code § 363 is designed to allow a Chapter 11 debtor the flexibility to engage in ordinary transactions without unnecessary creditor and bankruptcy court oversight while protecting creditors by giving them an opportunity to be heard when transactions are not ordinary.”) (quoting *In re Roth Am., Inc.*, 975 F.2d 949, 952 (3rd Cir. 1992)). Moreover, the “‘ordinary course of business’ standard is intended to allow a debtor the flexibility it needs to run its business and respond quickly to changes in the business climate.” *U.S. ex rel. Harrison v. Estate of Deutscher*, 115 B.R. at 598 (quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 617 (Bankr. S.D.N.Y. 1986)).

18. The Bankruptcy Code does not define “ordinary course of business.” However, “through a synthesis of case law, courts have developed a workable analytical framework for determining whether an activity is within the debtor’s ‘ordinary course of business.’” *In re Husting Land & Dev., Inc.*, 255 B.R. 772, 778 (Bankr. D. Utah 2000), *aff’d*, 274 B.R. 906 (D. Utah 2002). “Typically courts examine the ‘horizontal’ and ‘vertical’ dimensions of a debtor’s business to address these policies reflected in the Code and to determine whether a transaction is outside the ordinary course of business.” *In re Cook & Sons Mining, Inc.*, 2005 WL 2386238, at *4 (quoting *In re Crystal Apparel, Inc.*, 220 B.R. 816, 831 (Bankr. S.D.N.Y. 1998)).

19. The horizontal test is “an objective test asking whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry.” *In re Cook & Sons Mining, Inc.*, 2005 WL 2386238, at *4 (quoting *In re Roth Am., Inc.*, 975 F.2d at 953); *see also Peltz v. Gulfcoast Workstation Grp. (In re Bridge Info. Sys., Inc.)*, 293 B.R. 479, 486 (Bankr. E.D. Mo. 2003) (a transaction qualifies as “ordinary course” if it “is of the type that is commonly undertaken within the debtor’s industry.”).

20. The vertical dimension examines “the reasonable expectations of interested parties as to this particular debtor-in-possession.” *In re Cook & Sons Mining, Inc.*, 2005 WL 2386238, at *4 (“Thus, the issue is whether the transaction ‘is the type of transaction which creditors would expect to have advance notice of and have a chance to object to.’”) (quoting *In re Waterfront Cos., Inc. v. Johnston*, 56 B.R. 31, 35 (Bankr. D. Minn. 1985)); see also *In re James A. Phillips, Inc.*, 29 B.R. 391, 394 (Bankr. S.D.N.Y. 1983) (“The touchstone of ‘ordinariness’ is [] the interested parties’ reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business. So long as the transactions conducted are consistent with these expectations, creditors have no right to notice and hearing, because their objections to such transactions are likely to relate to the bankrupt’s chapter 11 status, not the particular transactions themselves.”).

21. An important characteristic of an “ordinary” postpetition business transaction is its similarity to a prepetition business practice. *Marshack v. Orange Comm. Credit (In re Nat’l Lumber & Supply, Inc.)*, 184 B.R. 74, 79 (B.A.P. 9th Cir. 1995) (to qualify as ordinary course, payment must be consistent with the past practices and industry standards), (*abrogated on other grounds by Office of the U.S. Tr. v. Hayes (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 104 F.3d 1147, 1148 (9th Cir. 1997)). Relevant factors in determining whether a transaction is ordinary include the type of business a debtor is engaged in as well as the size and nature of the business and transaction in question. *U.S. ex rel. Harrison v. Estate of Deutscher*, 115 B.R. at 598. While the Debtors do not believe that Court approval is required to continue honoring and maintaining the Customer Programs in the ordinary course of business, out of an abundance of caution, the Debtors request entry of the Interim Order and the Final Order authorizing them to continue to honor and maintain such programs postpetition.

22. The Debtors submit that the requested relief represents a sound exercise of the Debtors' business judgment, is necessary to avoid immediate and irreparable harm, and is justified under sections 363(b) and 363(c) of the Bankruptcy Code. If the Debtors are prohibited from honoring and maintaining their Customer Programs consistent with their past business practices, customers will likely lose confidence in the Debtors' ability provide goods and services on competitive terms. In addition, the damage from refusing to honor these commitments far exceeds the costs (if any) associated with honoring prepetition commitments and continuing these practices. The relief requested herein will protect the Debtors' goodwill during this critical time and enhance the Debtors' ability to generate revenue. Consequently, all of the Debtors' creditors will benefit if the requested relief is granted.

23. Accordingly, the Debtors request that they, in their discretion, be authorized to continue, renew, replace, implement new and/or terminate the Customer Programs and any other customer practices as they deem appropriate, without further application to the Court. Any delay in the relief sought—indeed, even being forced to advise customers that further judicial relief is necessary—could result in the Debtors losing a portion of their customer base and severe harm to their estates. Accordingly, the requested relief is necessary to avoid immediate and irreparable harm to the Debtors and to their estates, which would far outweigh the cost of the Customer Programs.

24. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' right to dispute any claim, or an approval or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order granting the Motion is not intended and should not be construed as

an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

B. Section 105 of the Bankruptcy Code and the “Doctrine of Necessity” Support the Continuation of the Customer Programs

25. In addition, the Debtors submit that the Court may grant the relief requested herein under the “doctrine of necessity” and to the extent applicable, section 105(a) of the Bankruptcy Code. For the reasons set forth above, and in light of the need for the Debtors to preserve the going concern value of their businesses, the relief requested herein is proper and should be granted.

26. Section 105(a) of the Bankruptcy Code empowers bankruptcy courts to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C § 105(a). Section 1107(a) of the Bankruptcy Code “contains an implied duty of the debtor-in-possession” to “protect and preserve the estate, including operation business’ going-concern value,” on behalf of the debtors’ creditors and other parties in interest. *In re CEI Roofing, Inc.*, 315 B.R. 50, 59 (Bankr. N.D. Tex. 2004) (quoting *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002)); *see also Unofficial Comm. of Equity Holders v. McManigle (In re Penick Pharm., Inc.)*, 227 B.R. 229, 232-33 (Bankr. S.D.N.Y. 1998) (“[U]pon filing its petition, the Debtor became debtor in possession and, through its management was burdened with the duties and responsibilities of a bankruptcy trustee.”).

C. Precedent Cases Support the Granting of the Requested Relief

27. The relief requested in this Motion is similar to relief granted by numerous courts, including this Court in other chapter 11 cases in this district. *See, e.g., In re Hexion Holdings LLC*, Case No. 19-10684 (KG) (Bankr. D. Del. Apr. 1, 2019); *In Re Imerys Talc Am. Inc.*, Case No. 19-10289 (LSS) (Bankr. D. Del. Feb. 13, 2019); *In re Samuels Jewelers, Inc.*,

Case No. 18-11818 (KJC) (Bankr. D. Del. Sep. 18, 2018); *In re Aralez Pharms. US Inc.*, Case No. 18-12425 (MG) (Bankr. D. Del. Sep. 14, 2018); *In re J & M Sales Inc.*, No. 18-11801 (LSS) (Bankr. D. Del. Aug. 7, 2018); *In re Claire's Stores, Inc.*, Case No. 18-10584 (MFW) (Bankr. D. Del. Mar. 20, 2018); *In re The Bon-Ton Stores, Inc.*, Case No. 18-10248 (MFW) (Bankr. D. Del. Feb. 6, 2018); *In re Vitamin World, Inc.*, Case No. 17-11933 (KJC) (Bankr. D. Del. Oct. 6, 2017).

**BANKRUPTCY RULE 6003 HAS BEEN SATISFIED AND
BANKRUPTCY RULE 6004 SHOULD BE WAIVED**

28. To the extent applicable, pursuant to Bankruptcy Rule 6003, the Court may grant relief regarding a motion to pay all or part of a prepetition claim within twenty-one days after the Petition Date if the relief is necessary to avoid immediate and irreparable harm. *See* Fed. R. Bankr. P. 6003(b). Based on the foregoing, the Debtors submit that they have satisfied the requirements of Bankruptcy Rule 6003(b) because the relief set forth in Exhibit A is necessary to avoid immediate and irreparable harm.

29. To the extent that any aspect of the relief sought herein constitutes a use of property under section 363(b) of the Bankruptcy Code, the Debtors request a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen day stay under Bankruptcy Rule 6004(h). As described above, the relief that the Debtors request in this Motion is immediately necessary in order for the Debtors to be able to continue to operate their businesses and preserve the value of their estates. The Debtors respectfully request that the Court waive the notice requirements imposed by Bankruptcy Rule 6004(a) and the fourteen day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

CONSENT TO JURISDICTION

30. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), the Debtors consent to the entry of a final judgment or order with respect to this Motion if it is determined that the Court would lack Article III jurisdiction to enter such final judgment or order absent consent of the parties.

RESERVATION OF RIGHTS

31. Nothing contained herein is or should be construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors’ properties; (ii) a waiver of the Debtors’ rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute an allowed claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors’ rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to the proposed Interim Order and Final Order once entered. Nothing contained in the Interim Order or the Final Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

NOTICE

32. Notice of this Motion will be given to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the United States Attorney for the District of Delaware; (iii) the Internal Revenue Service; (iv) the creditors listed on the Debtors’ consolidated list of thirty creditors holding the largest unsecured claims; (v) counsel to the DIP Agent and the Prepetition Agents; (vi) counsel to Insight Equity; and (vii) all parties entitled to notice pursuant to Local

Rule 9013-1(m). The Debtors submit that, under the circumstances, no other or further notice is required.

33. A copy of this Motion is available on (i) the Court's website: www.deb.uscourts.gov, and (ii) the website maintained by the Debtors' proposed Claims and Noticing Agent, Kurtzman Carson Consultants LLC, at <https://www.kccllc.net/EmergeEnergy>.

NO PRIOR REQUEST

34. No previous request for the relief sought herein has been made to this Court or any other court.

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WHEREFORE, the Debtors respectfully request that the Court enter the proposed Interim and Final Orders substantially in the forms attached hereto as Exhibit A and Exhibit B, respectively, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: July 15, 2019
Wilmington, Delaware

/s/ Paul N. Heath

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Proposed Counsel for Debtors and Debtors-in-Possession

EXHIBIT A

Proposed Interim Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

	X	
In re:	:	Chapter 11
	:	
EMERGE ENERGY SERVICES LP, <i>et al.</i> , ¹	:	Case No. 19-_____ (_____)
	:	
Debtors.	:	(Joint Administration Requested)
	:	
	X	

**INTERIM ORDER UNDER 11 U.S.C. §§ 105 (a), 363(b) AND 363(c) AND FED. R. BANKR. P. 6003 AND 6004 AUTHORIZING THE DEBTORS TO
CONTINUE THEIR CUSTOMER PROGRAMS**

Upon the motion (the “**Motion**”)² of the Debtors for entry of an Interim Order authorizing the Debtors to continue their Customer Programs; and the Court having reviewed the Motion and the Gaston Declaration; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States Constitution; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary, except as set forth in the Motion with respect to entry of this Interim Order and notice of the final hearing; and upon the record herein; and after due deliberation thereon; and the Court

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Emerge Energy Services LP (2937), Emerge Energy Services GP LLC (4683), Emerge Energy Services Operating LLC (2511), Superior Silica Sands LLC (9889), and Emerge Energy Services Finance Corporation (9875). The Debtors’ address is 5600 Clearfork Main Street, Suite 400, Fort Worth, Texas 76109.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

having determined that there is good and sufficient cause for the relief granted in this Interim Order, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED on an interim basis, as set forth herein.
2. The Debtors are authorized, but not directed, to continue, renew, replace, modify, implement new and/or terminate the Customer Programs and any other customer practices as they deem appropriate, without further application to the Court, including making all payments, honoring all discounts and credits, satisfying all obligations, and permitting and effecting all setoffs in connection therewith, in each case whether related to the prepetition period or the postpetition period.
3. Nothing in the Motion or this Interim Order, or the Debtors' payment of any claims pursuant to this Interim Order, shall be deemed or construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors' properties; (ii) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute an allowed claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to this Interim Order. Nothing contained in this Interim Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

4. Nothing in this Interim Order or the Motion shall be construed as prejudicing any rights the Debtors may have to dispute or contest the amount of or basis for any claims asserted against the Debtors in connection with any Customer Program.

5. The contents of the Motion satisfy the requirements of Bankruptcy Rules 6003(b) and 6004(a).

6. Notwithstanding Bankruptcy Rule 6004(h), to the extent applicable, this Interim Order shall be effective and enforceable immediately upon entry hereof.

7. The Debtors are hereby authorized to take such actions and to execute such documents as may be necessary to implement the relief granted by this Interim Order.

8. Notwithstanding anything to the contrary in the Motion or this Interim Order, any payment made or authorization hereunder shall be subject to the applicable budget and/or cash collateral authorization requirements imposed on the Debtors under any order(s) of the Court authorizing the Debtors' use of cash collateral and post-petition debtor-in-possession financing facilities, including any order(s) authorizing post-petition financing.

9. The final hearing (the "**Final Hearing**") on the Motion shall be held on [_____, 2019, at ____:____ .m], prevailing Eastern Time. On or before [__:__ .m.], prevailing Eastern Time, on [_____, 2019], any objections or responses to entry of a final order on the Motion shall be filed with the Court, and served on: (i) Emerge Energy Services, LP, 5600 Clearfork Main Street, Suite 400, Fort Worth, Texas 76109 (Attn: Bryan Gaston (email: bgaston@sssand.com)); (ii) Latham & Watkins LLP, 885 Third Avenue, New York, New York 10022 (Attn: Keith A. Simon, Esq., Hugh K. Murtagh, Esq. and Liza L. Burton, Esq. (emails: keith.simon@lw.com, hugh.murtagh@lw.com and liza.burton@lw.com)); (iii) Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, Delaware 19801 (Attn:

John H. Knight, Esq. and Paul N. Heath, Esq. (emails: knight@rlf.com and heath@rlf.com)); (iv) counsel to the DIP Agent and the Prepetition Agents, (a) Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (Attn: Matt S. Barr, Esq., David Griffiths, Esq., and Candace M. Arthur, Esq. (emails: matt.barr@weil.com, david.griffiths@weil.com, and candace.arthur@weil.com)) and (b) Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, Wilmington, Delaware 19801 (Attn: Laura Davis Jones, Esq. (email: ljones@pszjlaw.com)); and (v) the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Wilmington, DE 19801 Juliet M. Sarkessian, Esq. (email: juliet.m.sarkessian@usdoj.gov)). In the event no objections to entry of the Final Order on the Motion are timely received, this Court may enter such Final Order without need for the Final Hearing.

10. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Interim Order.

Dated: _____, 2019
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

Proposed Final Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

	X	
In re:	:	Chapter 11
	:	
EMERGE ENERGY SERVICES LP, <i>et al.</i> , ¹	:	Case No. 19-_____ (_____)
	:	
Debtors.	:	(Jointly Administered)
	:	
	X	

**FINAL ORDER UNDER 11 U.S.C. §§ 105(a), 363(b) AND 363(c) AND FED. R. BANKR.
P. 6003 AND 6004 AUTHORIZING THE DEBTORS TO
CONTINUE THEIR CUSTOMER PROGRAMS**

Upon the motion (the “Motion”)² of the Debtors for entry of a Final Order authorizing the Debtors to continue their Customer Programs; and the Court having reviewed the Motion, the Gaston Declaration, and the Interim Order entered on [_____], 2019; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States Constitution; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and the Court having

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: Emerge Energy Services LP (2937), Emerge Energy Services GP LLC (4683), Emerge Energy Services Operating LLC (2511), Superior Silica Sands LLC (9889), and Emerge Energy Services Finance Corporation (9875). The Debtors’ address is 5600 Clearfork Main Street, Suite 400, Fort Worth, Texas 76109.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

determined that there is good and sufficient cause for the relief granted in this Final Order, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED on a final basis as, set forth herein.
2. The Debtors are authorized, but not directed, to continue, renew, replace, modify, implement new and/or terminate the Customer Programs and any other customer practices as they deem appropriate, without further application to the Court, including making all payments, honoring all discounts and credits, satisfying all obligations, and permitting and effecting all setoffs in connection therewith, in each case whether related to the prepetition period or the postpetition period.
3. Nothing in the Motion or this Final Order, or the Debtors' payment of any claims pursuant to this Final Order, shall be deemed or construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors' properties; (ii) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute an allowed claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to this Final Order. Nothing contained in this Final Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

4. Nothing in this Final Order or the Motion shall be construed as prejudicing any rights the Debtors may have to dispute or contest the amount of or basis for any claims asserted against the Debtors in connection with any Customer Program.

5. Notwithstanding Bankruptcy Rule 6004(h), to the extent applicable, this Final Order shall be effective and enforceable immediately upon entry hereof.

6. The Debtors are hereby authorized to take such actions and to execute such documents as may be necessary to implement the relief granted by this Final Order.

7. Notwithstanding anything to the contrary in the Motion or this Final Order, any payment made or authorization hereunder shall be subject to the applicable budget and/or cash collateral authorization requirements imposed on the Debtors under any order(s) of the Court authorizing the Debtors' use of cash collateral and post-petition debtor-in-possession financing facilities, including any order(s) authorizing post-petition financing.

8. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Final Order.

Dated: _____, 2019
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE