

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. 19-11563 (KBO)
: :
Debtors. : (Jointly Administered)
: :
: Obj. Deadline: August 7, 2019 at 4:00 p.m. (ET)
: Hr’g Date: August 14, 2019 at 11:00 a.m. (ET)
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DEBTORS’ MOTION FOR ENTRY OF ORDER UNDER 11 U.S.C. §§ 105(a), 363(b), 503(b)(9), 1107(a), AND 1108 AND FED. R. BANKR. P. 6003 (I) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF THE CRITICAL VENDORS; (II) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS; AND (III) GRANTING RELATED RELIEF

The debtors and debtors-in-possession in the above-captioned cases (collectively, the “**Debtors**”) hereby file this motion (the “**Motion**”) for entry of an order substantially in the form attached hereto as Exhibit A (the “**Order**”), under sections 105(a), 363(b), 503(b)(9), 1107(a), and 1108 of title 11 of the United States Code (the “**Bankruptcy Code**”) and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), (i) authorizing, but not directing, the Debtors to pay, in the ordinary course of business, the prepetition fixed, liquidated, and undisputed claims of the critical vendors and service providers, subject to the conditions described herein, (ii) authorizing financial institutions to honor and process related checks and transfers, and (iii) granting certain related relief. 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 on the

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.



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Petition Date (as defined below) (the “**Gaston Declaration**”).² In further support of the Motion, the Debtors, by and through their undersigned counsel, respectfully represent:

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 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), 503(b)(9), 1107(a), and 1108 of the Bankruptcy Code and Bankruptcy Rule 6003.

BACKGROUND

2. On July 15, 2019 (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court commencing cases (the “**Chapter 11 Cases**”) for relief under chapter 11 of the Bankruptcy Code. 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.

RELIEF REQUESTED

4. By this Motion, the Debtors request entry of the Order, and request that the Court authorize, but not direct, the Debtors to pay the prepetition fixed, liquidated, and undisputed

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

claims (the “**Critical Vendor Claims**”) owing to certain suppliers of goods and services, with whom the Debtors continue to do business and whose goods and services are critical and essential to the Debtors’ operations (the “**Critical Vendors**”) in an amount not to exceed \$1,000,000 on a final basis (the “**Critical Vendor Cap**”), as more particularly described and on the terms set forth below. As described below, payment of the Critical Vendor Claims is necessary to protect the Debtors’ assets and operations and preserve value for the Debtors’ estates and creditors.³

5. The Debtors also request that the Court (i) authorize the Debtors’ banks and financial institutions to receive, process, honor, pay, and, if necessary, reissue all prepetition and postpetition checks and fund transfers, including prepetition checks and electronic payment and transfer requests that the Debtors reissue or re-request postpetition, on account of obligations owed to the Critical Vendors, and (ii) authorize the Debtors’ banks and financial institutions to rely on the representations of the Debtors as to which checks and fund transfers should be honored and paid in respect of such obligations, provided that sufficient funds are on deposit in the applicable accounts to cover such payments.

BASIS FOR RELIEF

A. Payment of the Critical Vendor Claims is in the Best Interests of the Debtors’ Estates and Their Creditors

6. As more particularly described in the Gaston Declaration, the Debtors operate businesses throughout North America that are primarily engaged in the businesses of mining,

³ On the Petition Date, the Debtors sought authority to pay certain other claims held by prepetition trade creditors (the “**Other Trade Claims**”) pursuant to the *Debtors’ Motion for Entry of Orders Under 11 U.S.C. §§ 105(a), 363(b), 506(b), 541, 1107(a), and 1108 and Fed. R. Bankr. P. 6003 (I) Authorizing Debtors to Pay Certain Prepetition Claims of Shippers, Lien Claimants, and Royalty Interest Owners, (II) Confirming Administrative Expense Priority of Undisputed and Outstanding Prepetition Orders, and (III) Granting Related Relief* (the “**Lienholder Motion**”). Amounts the Debtors sought to pay on account of the Other Trade Claims have not been factored into the Critical Vendor Cap.

processing, and distributing high-quality silica sand — a key input for the hydraulic fracturing of oil and natural gas wells. The Debtors' ordinary course operations generally involve the mining of silica sand from open pit environments, the processing of the sand at wet and dry plant facilities designed to separate the sand from unusable materials, and the distribution of sand to customers, either directly or through transloading facilities located in key basins throughout North America. In order to ensure the success of the Debtors' businesses, the Debtors necessarily rely on certain Critical Vendors that provide the Debtors with goods and services related to the Debtors' mining and sand processing operations. Without the goods and services provided by the Critical Vendors, the Debtors would be unable to efficiently mine, process, and supply silica sand to their customers.

7. As further described below, the Debtors believe payment of the Critical Vendor Claims as requested herein is necessary due to the critical nature of the goods and services provided by the Critical Vendors. These goods and services are critical for several reasons. Certain Critical Vendors represent one of a few vendors, within a particular area, that can provide the goods and services that the Debtors require to operate their businesses. In addition, the Debtors require certain specialized supplies, materials, services and equipment that only a handful of vendors that are reasonably accessible to the Debtors have the means or skillset to provide. Therefore, if these existing Critical Vendors were to stop doing business with the Debtors, it would be difficult and potentially cost-prohibitive for the Debtors to locate acceptable alternative vendors and suppliers. As a result, any inability to continue receiving goods or services from these specific vendors would greatly disrupt the Debtors' businesses.

8. Accordingly, unless the Debtors are authorized to pay the Critical Vendor Claims, the Debtors believe that the Critical Vendors may refuse to provide critical goods and services,

resulting in a material disruption of the Debtors' operations. The Debtors presently have dozens of customers, and such a disruption in operations could lead to a significant loss of business, erosion of goodwill, and deterioration in the value of the Debtors' operations to the detriment of the Debtors' stakeholders.

9. The Debtors request authorization to pay the Critical Vendor Claims, subject to the criteria below, because payment of such claims is necessary to provide operational stability, achieve the Debtors' chapter 11 objectives, and preserve the value of their businesses for the benefit of all stakeholders. Furthermore, and as set forth below, to the extent possible, the Debtors propose to condition the payment of each Critical Vendor Claim on the agreement of the applicable Critical Vendor to continue supplying goods and/or services to the Debtors on the same or better trade terms (including, without limitation, credit limits, pricing, timing of payments, allowances, rebates, discounts, and other applicable terms and programs) than such Critical Vendor offered the Debtors immediately prior to the Petition Date, or, if more favorable, within the sixty-day period prior to the Petition Date (the "Customary Trade Terms"), or pursuant to such other trade practices and programs that are favorable to the Debtors.

B. Stringent Criteria Will Be Used to Identify Critical Vendors

10. Certain of the Debtors' employees and professionals who are responsible for maintaining, and have intimate knowledge of, the Debtors' vendor and service provider relationships, have conducted, and will continue to conduct, an extensive analysis and review of the Debtors' immediate needs for goods and services in order to properly identify the Critical Vendors.

11. As part of such analysis and review, the Debtors have used, and will continue to use, the following criteria to determine which of the Debtors' vendors and service providers should be designated as Critical Vendors: (i) whether the vendor or service provider is a sole-

source or limited source provider; (ii) whether the Debtors receive advantageous pricing or other terms from a vendor or service provider such that a postpetition replacement would result in significantly higher costs; (iii) whether quality requirements, geographic constraints, customizations, or other specifications prevent the Debtors from obtaining the necessary goods or services from alternative sources within a reasonable timeframe; (iv) if the vendor is not a sole source provider, whether the Debtors have insufficient inventory of goods or in-house capabilities to continue operations while a replacement is found; (v) whether the Debtors can afford the time and expense of an enforcement action if a vendor or service provider that is contractually obligated to continue to provide goods and services to the Debtors wrongfully refuses to perform; (vi) whether a vendors' prepetition claim is entitled to administrative expense status under section 503(b)(9) of the Bankruptcy Code; and (vii) whether a vendor or service provider meeting any of the aforementioned standards in (i) through (vii) refuses to, demands pricing or trade terms that constitute an effective refusal to, or is likely financially unable to, provide goods or services to the Debtors on a postpetition basis if the prepetition balances are not paid. The Debtors are confident that this process will result in designating only those vendors and service providers that are truly critical to the Debtors' estates as Critical Vendors.

C. Types of Goods and Services Giving Rise to Critical Vendor Claims Evidences Necessity for Payment

12. Among the Critical Vendors identified by the Debtors are certain providers of essential goods and services that the Debtors rely upon in the operation of their businesses. These vendors are critical to the Debtors' businesses because they (i) possesses unique technical knowledge regarding, and have familiarity with, the Debtors' silica sand processing and mining operations, (ii) provide specialized materials and/or services to the Debtors that are vital to the Debtors' operations, (iii) are located near the Debtors' operations, or (iv) provide some

combination of the foregoing.

13. For instance, the Debtors rely upon certain Critical Vendors for excavating and mining services and equipment, logistics services, and information technology functions. The Critical Vendors also provide certain services necessary to ensure health, safety, environmental, and regulatory compliance related to the Debtors' mining and sand processing operations. The Debtors also depend on certain Critical Vendors to provide and maintain certain specialized equipment and other products critical to their mining operations, including heavy machinery (*e.g.*, devices used to excavate, process, and transport sand), equipment (*e.g.*, scrubbing and de-agglomeration, thickening and dewatering, and water management and reuse equipment), and certain requisite goods and materials (*e.g.*, water-soluble polymers and filtration and heat transfer products). Procurement and proper maintenance of the Debtors' mining and plant related equipment as well as access to the other goods and services described above are necessary for the effective operation of the Debtors' mining and wet and dry plant facilities. Without access to these goods and services, the Debtors' revenue streams could be adversely impacted and the Debtors' relationships with their customers could be harmed.

14. Finding replacements for these Critical Vendors would be challenging, costly, and could interrupt the Debtors operations if they are unable to locate a replacement on a timely basis. Certain Critical Vendors may be the only provider, or one of only a handful of providers, that can provide, are licensed to provide, or are in close enough proximity to the Debtors, to provide the required services. Moreover, even if another vendor could ultimately be obtained, there would be substantial delay in switching vendors (for example, for vendors whose work includes heavy-duty equipment that cannot be easily removed from or transported to the Debtors). As a result, (i) it would be more expensive and, in certain instances, cost-prohibitive to

locate a new vendor, and (ii) replacement of the vendor could result in curtailment or serious delays to the Debtors' operations.

15. Furthermore, the Critical Vendors have a deep understanding of the Debtors' mining sites and safety needs, and maintain the requisite expertise, infrastructure, and personnel necessary to service the Debtors' operations. The Debtors would be required to expend significant time and costs educating and qualifying any replacement vendors. The Debtors may also receive discounted rates from certain Critical Vendors as a result of their existing business relationships that the Debtors would not be able to obtain or replicate with a new vendor.

16. The Critical Vendors satisfy the criteria described in Paragraph 12 above. The Debtors believe that there is a high likelihood that the Critical Vendors will refuse to continue to do business with the Debtors if its outstanding prepetition claims are not paid. Any refusal by the Critical Vendors to provide essential goods or perform key services would have immediate and severe adverse repercussions, including jeopardizing or impairing the value of the Debtors' businesses. The Debtors maintain that paying the Critical Vendor Claims is both necessary and essential to their ability to achieve their chapter 11 objectives and preserve value for their various constituencies. The Debtors believe that approximately \$1,000,000 is owed to Critical Vendors as of the Petition Date.

D. Proposed Terms and Conditions for Payment of Critical Vendor Claims

17. The Debtors will attempt to condition the payment of Critical Vendor Claims on the agreement of individual Critical Vendors to continue supplying goods or services to the Debtors on Customary Trade Terms. The Debtors reserve the right to negotiate new trade terms (the "**Minimum Credit Terms**") with any Critical Vendor as a condition to payment of any Critical Vendor Claim, in the Debtors' sole discretion.

18. To ensure that the Critical Vendors transact with the Debtors on either Customary

Trade Terms or Minimum Credit Terms, the Debtors propose that a letter agreement (a “**Trade Agreement**”)⁴ substantially in the form attached hereto as Exhibit B be sent to the Critical Vendors for execution, together with a copy of the Order granting this Motion.

19. The Debtors propose that each Trade Agreement include, without limitation:
- (i) the amount of the relevant Critical Vendor’s estimated Critical Vendor Claims, as applicable, accounting for any setoffs, other credits, and discounts thereto; *provided, however*, such amount shall be used only for the purposes of determining such Critical Vendor’s claim subject to the Order and shall not be deemed a claim allowed by the Court, and the rights of all interested persons to object to such claim shall be fully preserved until further order of the Court;
 - (ii) the Customary Trade Terms or Minimum Credit Terms applicable to such Critical Vendor, or such other terms as the Critical Vendor and the Debtors may agree, and the Critical Vendor’s agreement to provide goods or services to the Debtors under such terms for the duration of the Chapter 11 Cases unless the Debtors fail to make timely payments under the agreed-upon trade terms;
 - (iii) the Critical Vendor’s agreement not to file or otherwise assert, directly or indirectly, against any or all of the Debtors, their estates, or any of their respective assets or property (real or personal), any Lien, a claim for reclamation (a “**Reclamation Claim**”), or a claim under section 503(b)(9) of the Bankruptcy Code (a “**503(b)(9) Claim**”), regardless of the statute or other legal authority upon which such Lien, Reclamation Claim, or 503(b)(9) Claim may be asserted, related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtors arising from agreements or other arrangements entered into prior to the Petition Date; and, to the extent the Critical Vendor, as applicable, has already obtained or otherwise asserted such a Lien, Reclamation Claim, or 503(b)(9) Claim, the Critical Vendor shall take (at such vendor’s own expense) whatever actions are necessary to remove such Lien or withdraw such Reclamation Claim or 503(b)(9) Claim, unless the Critical Vendor’s participation in the program to pay Critical Vendor Claims authorized by the Order is terminated;

⁴ The Debtors’ entry into a Trade Agreement will not change the nature or priority of the underlying Critical Vendor Claims and will not constitute an assumption or rejection of any executory contract or prepetition or postpetition agreement between the Debtors and a Critical Vendor.

- (iv) the Critical Vendor's agreement not to file a motion to compel assumption or rejection of any contract under which the Critical Vendor Claim arises; and
- (v) the Critical Vendor's acknowledgment that it has reviewed the terms and provisions of the Order sought hereby and is bound thereby.

20. By this Motion, the Debtors request only the authorization to enter into Trade Agreements when the Debtors determine, in their sole discretion, that payment of such Critical Vendor Claims is necessary to enable the Debtors to realize their chapter 11 objectives and that such Trade Agreements are advisable. The Debtors also request authorization to make payments on account of Critical Vendor Claims in the absence of a Trade Agreement if the Debtors determine, in their business judgment, that the failure to pay such Critical Vendor Claims will result in harm to the Debtors' business.⁵

21. In the event that a Critical Vendor party to a Trade Agreement refuses to supply goods and/or services to the Debtors on Customary Trade Terms or Minimum Credit Terms (or such other terms as are agreed by the parties) following receipt of payment on its Critical Vendor Claim, or otherwise fails to comply with its Trade Agreement with the Debtors, the Debtors reserve their rights to return the parties to the positions they held immediately prior to entry of the Order approving this Motion with respect to all prepetition claims. Further, the Debtors reserve their rights to and may seek approval of the Court to: (i) declare that any Trade Agreement between the Debtors and any Critical Vendor is terminated; (ii) declare that payments made to such Critical Vendor on account of its Critical Vendor Claims be deemed to have been in payment of then-outstanding (or subsequently accruing) postpetition claims of such Critical Vendor without further order of the Court or action by any person or entity; and (iii) recover or

⁵ Nothing in this Motion should be construed as a waiver by any of the Debtors of their rights to contest any claim of a Critical Vendor under applicable bankruptcy or non-bankruptcy law.

seek disgorgement of any payment made to such Critical Vendor on account of its Critical Vendor Claims to the extent that such payments exceed the value of the postpetition claims of such Critical Vendor, without giving effect to any rights of setoff, claims, provision for payment of reclamation or trust fund claims, or other defense. In addition, the Debtors reserve the right to seek damages or other appropriate remedies against any breaching Critical Vendor.

22. The Debtors further propose that any Trade Agreement terminated as a result of a Critical Vendor's refusal to comply with the terms thereof may be reinstated if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five business days following the Debtors' notification to the Critical Vendor of such a default; or the Debtors, in their sole discretion, reach a favorable alternative agreement with the Critical Vendor.

APPLICABLE AUTHORITY

23. The relief requested in this Motion is supported by several provisions of the Bankruptcy Code that authorize a debtor to honor prepetition obligations in certain circumstances. Courts have recognized each of these statutory provisions as valid authority for such payments.

A. The Court Should Authorize Payment of the Critical Vendor Claims as a Valid Exercise of the Debtors' Fiduciary Duties

24. Authority for the payment of the Critical Vendor Claims is found in sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors, operating their businesses as debtors-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code, are fiduciaries "holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners." *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor-in-possession is the duty "to protect and

preserve the estate, including an operating business's going-concern value." *Id.*

25. The *CoServ* court has held that there are instances in which a debtor-in-possession can fulfill its fiduciary duty "only . . . by the preplan satisfaction of a prepetition claim." *Id.* That court specifically held that preplan satisfaction of prepetition claims would be a valid exercise of a debtor's fiduciary duty when the payment "is the only means to effect a substantial enhancement of the estate," and also when the payment was to "sole suppliers of a given product." *Id.* at 497-98. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor's fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor's going concern value, which is disproportionate to the amount of the claimant's prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id.

26. Payment of the Critical Vendor Claims meets each element of the *CoServ* court's standard. As described above, the Debtors have narrowly tailored the list of Critical Vendors to include those vendors and service providers that satisfy the criteria described above. The disruption of the Debtors' operations would cause the Debtors' estates to lose revenue, which could negatively impact the Debtors' ability to achieve their chapter 11 objectives. The potential harm and economic disadvantage that would stem from the failure of any of the Critical Vendors to perform is grossly disproportionate to the amount of the prepetition claims that may be paid. Finally, with respect to each Critical Vendor, the Debtors have examined other options in place of payment of Critical Vendor Claims and have determined that, to avoid significant disruption of the Debtors' business operations, there exists no practical or legal alternative to payment of

the Critical Vendor Claims. Therefore, the Debtors can only meet their fiduciary duties as debtors-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code by payment of the Critical Vendor Claims.

B. The Court May Authorize Payment of the Critical Vendor Claims Under Sections 363 and 364 of the Bankruptcy Code

27. Additional authorization for the payment of the Critical Vendor Claims may be found through reliance on sections 363 and 364 of the Bankruptcy Code. With respect to the former, section 363(b)(1) of the Bankruptcy Code authorizes the trustee to use property of the estate other than in the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b)(1). Courts in this and other jurisdictions have relied on such subsection to authorize the payment of prepetition claims held by vendors. *See, e.g., In re MPC Computers, LLC*, Case No. 08-12667 (PJW) (Bankr. D. Del. Nov. 10, 2008) (authorizing, pursuant to § 363, the payment of prepetition claims of some suppliers); *In re Conseco, Inc.*, Case No. 02-49672 (CAD) (Bankr. N.D. Ill. Jan. 14, 2003); *Armstrong World Indus., Inc. v. James A. Phillips, Inc.*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (district court affirmed bankruptcy court's decision under section 363 of the Bankruptcy Code authorizing contractor to pay prepetition claims of some suppliers who were potential lien claimants).

28. Similarly, where, as here, the relief at issue involves a request impacting the trade terms among the Debtors and the vendor, the relief may, where the appropriate showing has been made, be approved pursuant to section 364 of the Bankruptcy Code. *See In re UAL Corp.*, Case No. 02-48191 (Bankr. N.D. Ill. Dec. 11, 2002) (essential trade motion relying upon section 363 of the Bankruptcy Code is “completely consistent with the Bankruptcy Code;” payments to critical trade vendors have further support when debtor seeks “the extension of credit under section 364 on different than usual terms, terms that might include the payment of a prepetition

obligation”).

29. The relief requested in this Motion contemplates payments to be made to Critical Vendors who agree to provide goods or services on Customary Trade Terms or Minimum Credit Terms, to the extent possible. As a result, the payment of such Critical Vendor Claims is consistent with and appropriate under sections 363 and 364 of the Bankruptcy Code. As detailed above, the goods and services provided by the Critical Vendors are vital to the Debtors’ continuing business operations.

C. The Court May Rely on the “Necessity of Payment” Doctrine and its General Equitable Powers to Grant the Motion

30. The relief sought is further supported by the “doctrine of necessity.” The doctrine of necessity is a well-settled doctrine that permits a bankruptcy court to authorize payment of certain prepetition claims prior to the completion of the chapter 11 case where the payment of such claims is necessary to the debtor’s restructuring efforts. *See In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding the payment of creditors’ claims authorized under “necessity of payment” doctrine); *In re Penn Central Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding the necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or materials essential to the conduct of the business until their pre-reorganization claims have been paid”); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-192 (Bankr. D. Del. 1994) (noting that the debtors “may pay pre-petition claims that are essential to continued operation of business”); *see also In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.”).

31. The Court’s power to utilize the doctrine of necessity in chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority 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). The United States Supreme Court first articulated the doctrine of necessity over a century ago, in *Miltenberger v. Logansport, C. & S.W. R. Co.*, 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. *See id.* at 309-14. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in *Miltenberger*. *See In re Lehigh & New Eng. Ry.*, 657 F.2d at 581-82 (“[I]n order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation . . . in serious jeopardy.”).

32. The Debtors submit that the requested relief represents a sound exercise of the Debtors’ business judgment, is justified under the legal precedent described above, and is in line with the relief granted in this Court and in other courts. The Debtors and their professional advisors have, from the outset of this process, developed a rigorous process to identify Critical Vendors and ensure that payments are only made to vendors that are truly critical and pose a material risk of nonperformance postpetition. The relief requested provides a material benefit to creditors that are not Critical Vendors as it will enhance the value of the Debtors’ estates by ensuring that critical goods and services continue to be supplied on a postpetition basis on terms that will permit the Debtors to continue operations without significant interruption. If the Motion is not granted and certain Critical Vendors refuse to perform key services or supply essential goods, the Debtors’ business operations could be severely impacted. The authority to pay Critical Vendor Claims as set forth herein is therefore necessary to maximize the value of the estates by ensuring that the Debtors continue to receive essential goods and services that are

actually or practically unavailable from other sources while preserving critical relationships with key vendors and customers.

D. Precedent Cases Support the Requested Relief

33. Courts in this jurisdiction and others have granted similar critical vendor relief in other cases. *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. Mar. 22, 2019); *In re Gibson Brands, Inc.*, Case No. 18-11025 (CSS) (Bankr. D. Del. May 23, 2018); *In re Claire's Stores, Inc.*, Case No. 18-10584 (MFW) (Bankr. D. Del. Apr. 17, 2018); *In re Patriot Nat'l, Inc.*, Case No. 18-10189 (KG) (Bankr. D. Del. Mar. 6, 2018); *In re TK Holdings Inc.*, Case No. 17-11375 (BLS) (Bankr. D. Del. Aug. 9, 2017).

E. Cause Exists to Authorize the Debtors' Financial Institutions to Honor Checks and Electronic Fund Transfers

34. The Debtors have sufficient funds to pay the Critical Vendor Claims described herein in the ordinary course of business by virtue of cash on hand and expected cash flows from ongoing business operations, including any debtor-in-possession financing. In addition, under the Debtors' existing cash management system, the Debtors can readily identify checks or wire transfer requests as relating to an authorized payment in respect of the Critical Vendor Claims. Accordingly, the Debtors believe there is minimal risk that checks or wire transfer requests that the Court has not authorized will be inadvertently made. The Debtors request that the Court authorize the Debtors' banks, when requested by the Debtors, to receive, process, honor and pay any and all checks or wire transfer requests in respect of the relief requested herein, solely to the extent that the Debtors have sufficient funds on deposit in the applicable accounts to cover such payments, and such banks may rely on the representations of the Debtors without any duty of further inquiry and without liability for following the Debtors' instructions.

WAIVER OF BANKRUPTCY RULES 6004(a) AND 6004(h)

35. 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).

RESERVATION OF RIGHTS

36. 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 a Critical Vendor 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 Order once entered. Nothing contained in the Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, or otherwise affect the Critical Vendor Claims to the extent they are not paid.

37. Additionally, nothing in this Motion is intended to modify or waive any of the Debtors' rights with respect to goods and services requested or received from the Critical Vendors, including the Debtors' rights to: (i) cancel a purchase order; (ii) decline the acceptance of goods and/or services; (iii) return any defective, nonconforming or unacceptable goods; or (iv) contest the amount of any invoice or claims on any grounds.

CONSENT TO JURISDICTION

38. 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 order or judgment absent consent of the parties.

NOTICE

39. 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 Bankruptcy Rule 2002. The Debtors submit that, under the circumstances, no other or further notice is required.

40. 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’ Claims and Noticing Agent, Kurtzman Carson Consultant LLC, www.kccllc.net/EmergeEnergy.

NO PRIOR REQUEST

41. 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 Order, substantially in the form attached hereto as Exhibit A, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: July 24, 2019
Wilmington, Delaware

/s/ Brett M. Haywood

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Proposed Counsel for Debtors and Debtors-in-Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

----- X
In re: : Chapter 11
: :
EMERGE ENERGY SERVICES LP, *et al.*,¹ : Case No. 19-11563 (KBO)
: :
Debtors. : Jointly Administered
: :
: : **Obj. Deadline: August 7, 2019 at 4:00 p.m. (ET)**
: : **Hearing Date: August 14, 2019 at 11:00 a.m. (ET)**
: :
----- X

NOTICE OF MOTION AND HEARING

PLEASE TAKE NOTICE that, on July 24, 2019, the debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**”) filed the *Debtors’ Motion for Entry of Order Under 11 U.S.C. §§ 105(a), 363(b), 503(b)(9), 1107(a), and 1108 and Fed. R. Bankr. P. 6003 (I) Authorizing Payment of Prepetition Claims of the Critical Vendors; (II) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers; and (III) Granting Related Relief* (the “**Motion**”) with the United States Bankruptcy Court for the District of Delaware (the “**Court**”).

PLEASE TAKE FURTHER NOTICE that, any responses or objections to the Motion must be in writing and filed with the Clerk of the Court, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801 on or before **August 7, 2019 at 4:00 p.m. (Prevailing Eastern Time)**.

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.

PLEASE TAKE FURTHER NOTICE that, if any objections to the Motion are received, the Motion and such objections shall be considered at a hearing before The Honorable Karen B. Owens, United States Bankruptcy Judge for the District of Delaware, at the Court, 824 North Market Street, 6th Floor, Courtroom 1, Wilmington, Delaware 19801 on **August 14, 2019 at 11:00 a.m. (prevailing Eastern Time)**.

PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS TO THE MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: July 24, 2019
Wilmington, Delaware

/s/ Brett M. Haywood

RICHARDS, LAYTON & FINGER, P.A.

John H. Knight (No. 3848)
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*Proposed Counsel for Debtors
and Debtors-in-Possession*

EXHIBIT A

Proposed 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. 19-11563 (KBO)
	:	
Debtors.	:	(Jointly Administered)
	:	
	X	

ORDER UNDER 11 U.S.C. §§ 105(a), 363(b), 503(b)(9), 1107(a), AND 1108 AND FED. R. BANKR. P. 6003 (I) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF THE CRITICAL VENDORS; (II) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS; AND (III) GRANTING RELATED RELIEF

Upon the motion (the “**Motion**”)² of the Debtors for entry of an Order under sections 105(a), 363(b), 503(b)(9), 1107(a), and 1108 of the Bankruptcy Code and Bankruptcy Rule 6003 (i) authorizing, but not directing, the Debtors to pay, in the ordinary course of business, the prepetition fixed, liquidated, and undisputed claims of the critical vendors and service providers, subject to the conditions described herein, (ii) authorizing financial institutions to honor and process related checks and transfers, and (iii) granting certain related relief; and the Court having reviewed the Motion, 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 February 29, 2012; and the Court having found that this is a core proceeding

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.

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 after due deliberation thereon; and the Court having determined that there is good and sufficient cause for the relief granted in this order, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED on a final basis, as set forth herein.
2. All objections to the entry of this Order, to the extent not withdrawn or settled, are overruled.
3. The Debtors are authorized, but not directed, in their sole discretion, to pay, or cause to be paid, the Critical Vendor Claims of their Critical Vendors, subject to the terms and conditions of this Order; *provided* that payments on account of Critical Vendor Claims shall not exceed \$1,000,000 in the aggregate pursuant to this Order without further order of this Court.
4. The Debtors are authorized, but not directed, to undertake appropriate efforts to cause the Critical Vendors to enter into a Trade Agreement with the Debtors substantially similar to the form attached as Exhibit B to the Motion, as a condition of payment of each Critical Vendor Claim.
5. If a Critical Vendor, whether under a Trade Agreement or otherwise, refuses to supply goods and/or services to the Debtors on Customary Trade Terms or Minimum Credit Terms (or such other terms as are agreed by the parties) following receipt of payment on its Critical Vendor Claims or otherwise fails to comply with any Trade Agreement entered into

between such Critical Vendor and the Debtors, then the Debtors reserve their rights to take any and all actions necessary to return the parties to the positions they held immediately prior to entry of this Order with respect to all prepetition claims, including but not limited to: (i) declaring that any Trade Agreement between the Debtors and such Critical Vendor is terminated; (ii) declaring that payments made to such Critical Vendor on account of its Critical Vendor Claims shall be deemed to have been made in payment of then-outstanding (or subsequently accruing) postpetition claims of such Critical Vendor without further order of the Court or action by any person or entity; and (iii) recovering or seeking disgorgement of any payment made to such Critical Vendor on account of its Critical Vendor Claims to the extent that such payments exceed the value of the postpetition claims of such Critical Vendor, without giving effect to any rights of setoff, claims, provision for payment of reclamation or trust fund claims, or other defense. Nothing herein shall constitute a waiver of the Debtors' rights to seek damages or other appropriate remedies against any breaching Critical Vendor.

6. Notwithstanding the foregoing, the Debtors may, in their sole discretion, reinstate a Trade Agreement if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five business days following the Debtors' notification to the Critical Vendor that such default has occurred or the Debtors, in their sole discretion, reach a favorable alternative agreement with the Critical Vendor.

7. The amount of each Critical Vendor's Critical Vendor Claim set forth in connection with a Trade Agreement shall be used only for purposes of determining such Critical Vendor's Claim for purposes of this Order and shall not be deemed a claim allowed by the Court, and the rights of all interested persons to object to the allowance of such claim shall be fully preserved until further order of the Court. Further, signing a Trade Agreement containing a

claim amount for purposes of this Order shall not excuse such Critical Vendor from filing a proof of claim in these cases.

8. No claimant who receives payment in full on account of a Critical Vendor Claim is permitted to, with respect to such Critical Vendor Claim, file or perfect a Lien on account of such claim, assert a Reclamation Claim, and/or assert a 503(b)(9) Claim, and any such claimant shall take all necessary action, at its expense, to remove any existing Lien relating to such claim, and to withdraw any Reclamation Claim or 503(b)(9) Claim, on account of such claim.

9. Nothing in the Motion or this Order, or the Debtors' payment of any claims pursuant to this 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 a Critical Vendor 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 Order. Nothing contained in this Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, change the priority, or otherwise affect the Critical Vendor Claims to the extent they are not paid.

10. Nothing in the Motion or this Order, nor the Debtors' implementation of the relief granted in this Order, shall be deemed to modify or waive any of the Debtors' rights with respect to goods and services requested or received from the Critical Vendors, including the Debtors' rights to (i) cancel a purchase order, (ii) decline the acceptance of goods and/or services,

(iii) return any defective, nonconforming or unacceptable good, or (vi) contest the amount of any invoice or claims on any grounds.

11. At the direction of the Debtors, the Debtors' banks and financial institutions shall be and hereby are authorized to receive, process, honor, pay, and, if necessary, reissue all prepetition and postpetition checks and fund transfers, including prepetition checks and electronic payment and transfer requests that the Debtors reissue or re-request postpetition, on account of obligations owed to any Critical Vendor, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. The Debtors' banks and other financial institutions are authorized to rely on the representations of the Debtors as to which checks and fund transfers should be honored and paid pursuant to this Order.

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

13. The Debtors are authorized to take all action necessary to effectuate the relief granted in this Order in accordance with the Motion.

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

Dated: _____, 2019
Wilmington, Delaware

THE HONORABLE KAREN B. OWENS
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

Trade Agreement

_____, 2019

TO: [Critical Vendor]
 [Name]
 [Address]

Trade Agreement

As you may be aware, on July 15, 2019 (the “**Petition Date**”), Emerge Energy Services LP, together with certain of its affiliates (collectively, the “**Debtors**”), filed voluntary petitions (the “**Bankruptcy Cases**”) under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”). On the Petition Date, we requested the Bankruptcy Court’s authority to pay certain vendors and service providers in recognition of the importance of our relationship with such vendors and service providers. On [____], 2019, the Bankruptcy Court entered an order (the “**Order**”) authorizing us, under certain conditions, to pay in the ordinary course prepetition claims of certain vendors and service providers that agree to be bound by the terms of the Order and to the terms set forth below. A copy of the Order is enclosed.

To receive payment in the ordinary course on pre-bankruptcy claims, we require you to agree to supply goods and/or services to the Debtors based on “Customary Trade Terms.” Customary Trade Terms are trade terms that are the same or better than the trade terms that existed immediately prior to the Petition Date or, if more favorable, that existed within the sixty day period prior to the Petition Date.

For purposes of administration of this trade program as authorized by the Bankruptcy Court (the “**Trade Payment Program**”), the Debtors and you agree as follows:

1. For purposes of this Trade Agreement, the estimated balance of your prepetition claim (accounting for any setoffs, credits or discounts) (the “**Prepetition Claim**”) is \$[_____]. The Prepetition Claim will be paid as follows: [_____].
2. The open trade balance or credit line you will extend shall be on normal and customary terms on an historical basis for the period prior to the Petition Date or, if more favorable, within the sixty day period prior to the Petition Date.
3. In consideration for the payment described herein, you agree not to file or otherwise assert, directly or indirectly, against any or all of the Debtors, their estates, or any of their respective assets or property (real or personal), any lien (a “**Lien**”), a claim for reclamation (a “**Reclamation Claim**”), or a claim under section 503(b)(9) of the Bankruptcy Code (a “**503(b)(9) Claim**”), regardless of the statute or other legal authority upon which such Lien, Reclamation Claim, or 503(b)(9) Claim may be asserted, related in any way to any remaining prepetition amounts allegedly owed to you by the Debtors arising from agreements or other arrangements entered into prior to the Petition Date. Any holders of potential 503(b)(9) Claims reserve all of their rights with respect to such claims until such claims are paid in full.

4. You will hereafter extend to the Debtors all Customary Trade Terms, which are:

[ADD INDIVIDUALIZED SET OF CUSTOMARY TRADE/SERVICE TERMS OR ATTACH/CROSS-REFERENCE TERM FROM EXISTING AGREEMENT]

Payment of your Prepetition Claim in the manner set forth in the Order may occur upon execution of this letter by a duly authorized representative of your company and the return of this letter to the Debtors. Your execution of this letter agreement and the return of the same to the Debtors constitute an agreement by you and the Debtors:

- (a) to the Customary Trade Terms and, subject to the reservations contained in the Order, to the amount of the Prepetition Claim set forth above;
- (b) that, for at least during the pendency of the Bankruptcy Cases, you will continue to supply the Debtors with goods and/or services under the Customary Trade Terms and any terms set forth herein and that the Debtors will pay for such goods and/or services in accordance with the terms hereof;
- (c) that you have reviewed the terms and provisions of the Order and acknowledge that you are bound by such terms;
- (d) that if either the Trade Payment Program or your participation therein terminates as provided in the Order, any payments received by you on account of your Prepetition Claim will be deemed to have been in payment of postpetition obligations owed to you, and the Debtors may take any and all appropriate steps to cause you to repay payments made to you on account of your Prepetition Claim to the extent that such payments exceed the postpetition amounts then owing to you, without giving effect to any rights of setoff, claims, provision for payment of reclamation or trust fund claims, or other defense; and
- (e) that the Debtors reserve all of their rights with respect to such claims.

The Debtors and you also hereby agree that any dispute with respect to this agreement, the Order and/or your participation in the Trade Payment Program shall be determined exclusively by the Bankruptcy Court.

Please indicate your agreement to the terms hereof by returning a signed copy of this letter to [Name] at (____)_____ or [Name] (____)_____.

Sincerely,

[Debtor]

By:

Its:

Agreed and Accepted by:

[Name of Critical Vendor/Service Provider]

By:

Its:

Dated: