

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re: : Chapter 11  
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EMERGE ENERGY SERVICES LP, *et al.*,<sup>1</sup> : Case No. 19-\_\_\_\_\_ (\_\_\_\_\_) :  
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Debtors. : (Joint Administration Requested) :  
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**DEBTORS’ MOTION FOR ENTRY OF ORDERS UNDER 11 U.S.C. §§ 105(a), 362(d), 363(b), 507(a), 541, 553, 1107(A), AND 1108 AND FED. R. BANKR. P. 6003 (I) AUTHORIZING (A) PAYMENT OF PREPETITION WORKFORCE OBLIGATIONS AND (B) CONTINUATION OF WORKFORCE PROGRAMS ON POSTPETITION BASIS, (II) AUTHORIZING PAYMENT OF PAYROLL-RELATED TAXES, (III) CONFIRMING THE DEBTORS’ AUTHORITY TO TRANSMIT PAYROLL DEDUCTIONS, (IV) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OWING TO ADMINISTRATORS, AND (V) DIRECTING BANKS TO HONOR PREPETITION CHECKS AND FUND TRANSFERS FOR AUTHORIZED PAYMENTS**

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), 362(d), 363(b), 507(a), 541, 553, 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 the Debtors to (a) pay certain prepetition amounts for compensation, benefits, and reimbursable expenses owing to or for the benefit of the Debtors’ Workforce (as defined below) and (b) continue the Workforce Programs (as defined below) in the ordinary course of business

<sup>1</sup> 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.



postpetition, as in effect immediately prior to the filing of the above captioned chapter 11 cases (the “**Chapter 11 Cases**”); (ii) confirming that the Debtors are authorized to pay any and all local, state and federal withholding and payroll-related or similar taxes relating to prepetition periods; (iii) confirming that the Debtors are permitted, but not required, to continue to deduct and to transmit deductions from payroll checks as authorized by Employees (as defined below), as required by any Workforce-related plan, program or policy, or as required by law; (iv) authorizing the Debtors to pay any prepetition claims owing to the Administrators (as defined below); and (v) authorizing and directing all banks to receive, process, honor, and pay all of the Debtors’ prepetition checks and fund transfers on account of any obligations authorized to be paid pursuant hereto. 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**”).<sup>2</sup> 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), 362(d), 363(b), 507(a), 541, 553, 1107(a), and 1108 of the Bankruptcy Code and Bankruptcy Rule 6003.

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

## BACKGROUND

2. On the date hereof (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court commencing 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 Final Order, (i) authorizing the Debtors, in their discretion, to (a) pay or otherwise honor various prepetition workforce-related obligations (the “**Workforce Obligations**”)<sup>3</sup> to or for the benefit of their employees (the “**Employees**”) and temporary workers (the “**Temporary Staff**” and, together with the Employees, the “**Workforce**”) for compensation, expense reimbursements, and benefits under all plans, programs, policies, and agreements maintained by, or for the benefit of, or contributed to or entered into by, the Debtors prior to the Petition Date (collectively, and as

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<sup>3</sup> The Workforce Obligations are comprised of the Workforce Compensation Obligations, the Employee Reimbursement Obligations and the Employee Benefits Obligations (each as defined and described herein).

further described herein, the “**Workforce Programs**”<sup>4</sup>, and (b) continue the Workforce Programs in the ordinary course of business during the pendency of the Chapter 11 Cases in the manner and to the extent that such Workforce Programs were in effect immediately prior to the filing of the Chapter 11 Cases;<sup>5</sup> (ii) confirming that the Debtors are authorized to pay any and all local, state, federal, and foreign withholding and payroll-related or similar taxes relating to the prepetition Workforce Obligations; (iii) confirming that the Debtors are permitted, but not required, to continue to deduct and to transmit deductions from payroll checks as authorized by Employees, as required by any Workforce-related plan, program or policy, or as required by law; (iv) confirming that the Debtors are permitted, but not required, to pay any prepetition claims owing to vendors and third party Administrators (as defined below); and (v) authorizing and directing all banks to receive, process, honor, and pay all of the Debtors’ prepetition checks and fund transfers on account of any obligations authorized to be paid pursuant hereto.

### **BASIS FOR RELIEF**

#### **A. The Debtors’ Workforce**

6. As of the Petition Date, the Debtors’ Workforce consisted of approximately 236 Employees (63 salaried and 173 hourly). None of the Debtors’ Employees are subject to a collective bargaining agreement or similar labor agreement. Because the Debtors’ business is cyclical in nature, the number of Employees fluctuates based on whether the Debtors are in a peak business season and the Debtors’ specific needs at any given time.

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<sup>4</sup> The Workforce Programs are comprised of the Workforce Compensation Programs, the Employee Reimbursement Programs, and the Employee Benefits Programs (each as defined and described herein).

<sup>5</sup> By this Motion, the Debtors do not seek to assume or reject any Workforce Program to the extent that such Workforce Program is deemed to be an executory contract within the meaning of section 365 of the Bankruptcy Code. Moreover, the Debtors do not waive their right to modify or terminate any Workforce Program to the extent that such right exists under the terms of the Workforce Program or as may be authorized by applicable law.

7. The Debtors' Workforce also consists of Temporary Staff. The number of Temporary Staff similarly fluctuates based on whether the Debtors are in a peak business season and the Debtors' specific needs at any given time. The Debtors do not currently employ any Temporary Staff, however, the Debtors may employ Temporary Staff postpetition on an as-needed basis during peak business seasons.

8. The Workforce provides a variety of critical functions, including operations, maintenance and repair, supply chain management, procurement, development, compliance, human resources, government reporting, accounting, employee health and safety, financial, general corporate, and facilities services. The skills, expertise, and experience of the Workforce, as well as their relationships with customers and vendors and their knowledge of the Debtors' business and infrastructure, are essential to the Debtors' operations and ability to effectively maximize the value of their businesses during the Chapter 11 Cases.

**B. Workforce Compensation Programs**

9. In the ordinary course of business, the Debtors compensate their Workforce by making various payments and allowances, including, without limitation: (i) making payments on account of Employee payroll and allocating Employee Deductions (as defined below), (ii) providing PTO (as defined below), (iii) making payments in connection with various Employee Incentive Programs (as defined below), and, if necessary, (iv) making payments to the Recruiting Agency and the Temporary Staffing Agency (each as defined below, and, together (i) – (iv), the “**Workforce Compensation Programs**” and, any obligations thereunder, the “**Workforce Compensation Obligations**”). The Workforce Compensation Programs are described in further detail below.

**i. Employee Payroll and Payroll Deductions**

**a. Employee Payroll**

10. The Employees are paid wages and salaries on a bi-weekly basis. The average payroll for each two-week pay period is approximately \$760,000. The Debtors utilize The Ultimate Software Group, Inc. (“**UltiPro**”) for payroll processing services related to payment of the Employees’ wages and salaries. The Debtors pay their Employees in arrears for work performed one week prior to the Debtors’ normal bi-weekly payroll. As a result, such Employees often have a significant amount of unpaid wages and other compensation that has accrued, but is unpaid. The Debtors estimate that, as of the Petition Date, they owe approximately \$900,000 in wages and salaries to Employees. Subject to entry of the Final Order, no Employees will be paid wages or salary compensation in excess of the \$13,650 statutory cap pursuant to section 507(a)(4) of the Bankruptcy Code.

**b. Payroll Deductions**

11. In the ordinary course of their businesses, the Debtors make deductions from Employees’ paychecks for payments to third parties on behalf of Employees for various federal, state, local, and foreign, income, FICA, employment insurance and other taxes, as well as for court ordered garnishments, savings programs, repayments for loans taken against the savings programs, benefit plans, insurance and other similar programs (collectively, the “**Deductions**”). The Debtors’ average aggregate bi-weekly Deductions for Employees is approximately \$290,000.

12. As of the Petition Date, certain of the Employees are owed certain prepetition amounts related to their compensation. Where Employees are owed such amounts, the applicable Deductions have not yet been taken. Additionally, the Debtors may not yet have forwarded to the various third parties noted above the payments that are attributable to the

Deductions that have been withheld from Employees' paychecks. The Debtors estimate that, as of the Petition Date, accrued but unpaid Deductions total approximately \$350,000.

**ii. PTO**

13. As part of their overall compensation, Employees are eligible, in certain circumstances, to receive paid time off ("**PTO**") for, among other things, vacation, personal days, and holidays. The specifics of the Debtors' PTO policies vary based upon the Employee's position and length of employment.

14. Employees are entitled to paid vacation time as set forth below:

<b>Employee Classification</b>	<b>Duration of Employment</b>	<b>Paid Leave and Accrual Rate</b>
Non-Management	0 to 4 years of service	2 weeks per year (3.0769 days per pay period)
	4 to 10 years of service	3 weeks per year (4.6153 days per pay period)
	10 years and more of service	4 weeks per year (6.1538 days per pay period)
Management	0 to 5 years of service	3 weeks per year (4.6153 days per pay period)
	5 years and more of service	4 weeks (6.1538 days per pay period)
Executive Level Management	0 to 3 years of service	3 weeks per year (4.6153 days per pay period)
	3 years and more of service	4 weeks (6.1538 days per pay period)

15. All Employees are entitled to an additional ten paid holidays per year (consisting of nine scheduled holidays and one personal holiday). The Debtors' Employees may carry over up to eighty hours of accrued but unused PTO time to the following year. Upon termination or retirement, Employees receive payment on account of any accrued and unused PTO days, subject to the applicable carry-over restrictions.

16. Employees are further entitled to bereavement leave, jury duty, reporting pay and, in some circumstances, emergency response service and military duty. Employees are also

entitled to paid sick time of between twenty-four and fifty-six hours per year, depending on the Employee's position with the Company.

17. The Debtors estimate that, as of the Petition Date, aggregate accrued but unpaid PTO liability for all Employees total approximately \$425,000. This accrued amount, however, does not represent a true "cash" liability for the Debtors, as the Debtors anticipate that Employees will use most of their PTO in the ordinary course of business, and eligible Employees receive cash payments on account of unused Earned Time Off upon termination or resignation.<sup>6</sup> Accordingly, unless an Employee is terminated or has resigned, PTO is not calculated for the purposes of the statutory priority cap under section 507(a)(4) of the Bankruptcy Code.

**iii. Employee Incentive Programs**

18. In the ordinary course of business, to encourage and reward outstanding performance, the Debtors offer certain Employees the opportunity to earn bonuses under certain bonus programs, including, most recently, (i) the Annual Bonus Program (as defined below), and (ii) the SIP (as defined below, and together with the Annual Bonus Program, the "**Employee Incentive Programs**"). Pursuant to the Employee Incentive Programs, eligible Employees may earn awards based on individual and business targets. Payments with respect to the Employee Incentive Programs are made by the Debtors directly to the applicable Employees. The Employee Incentive Programs are not retention or severance plans as contemplated by section 503(c) of the Bankruptcy Code.<sup>7</sup>

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<sup>6</sup> Eligible Employees have the option to request payout of their accrued PTO balance of up to 40 hours. The maximum potential associated liability that would be due to such Employees, should they all request this payout would be \$235,000, which amount is included in the \$425,000 PTO liability. As of the Petition Date no Employee has requested such a payout of their accrued PTO.

<sup>7</sup> For the avoidance of doubt, the Debtors are not seeking authority to make any retention or incentive payments to insiders.



**a. The Annual Bonus Program**

19. Under the Debtors' annual bonus program (the "**Annual Bonus Program**"), eligible Employees are entitled to a single bonus payment, usually paid at the end of the year. The payments under Annual Bonus Program are determined by the Debtors' management, entirely discretionary, and based on Company performance. Generally, hourly Employees receive a flat rate bonus in a specified amount, and salaried Employees, including executives and vice presidents, receive a certain percentage (between 5% and 80%) of their annual salary based on the title of such Employee. In December 2018, the Debtors paid approximately \$76,600 in the aggregate to hourly Employees in connection with the Annual Bonus Program.<sup>8</sup> As of the Petition Date, the Debtors believe that there are no amounts owed in connection with the Annual Bonus Program. The Debtors are not seeking authority to make any payments under the Annual Bonus Program in this Motion.

**b. The SIP**

20. The Debtors also maintain a stock incentive plan (the "**SIP**") by which the Debtors award eligible Employees shares of phantom stock. The SIP is available to Employees with the title of "plant manager" and above (totaling approximately six Employees who are not "insiders" as defined in the Bankruptcy Code as of the Petition Date). Although there are unvested shares of phantom stock under the SIP, the SIP is no longer in effect as to future grants of phantom stock. The Debtors do not believe that they will owe any amounts on account of the SIP or any phantom stock that may vest during these Chapter 11 Cases.

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<sup>8</sup> In June 2019 the Debtors paid \$362,500 in the aggregate to 54 salaried Employees in connection with the 2018 Annual Bonus Program.

**iv. The Recruiting Agency and the Temporary Staffing Agency**

21. The Debtors utilize the services of The Personnel Consulting Group (the “**Recruiting Agency**”) to assist in the hiring of certain corporate and sales Employees. The Recruiting Agency is paid a contingent fee upon the employment by the Debtors of a candidate provided by the Recruiting Agency. As of the Petition Date, the Debtors believe that there are no amounts to the Recruiting Agency.

22. In addition and as described above, in the ordinary course of business, Debtors hire Temporary Staff. The number of Temporary Staff fluctuates based on whether the Debtors are in a peak business season and the Debtors’ specific needs at any given time. The Debtors do not currently employ any Temporary Staff, however, the Debtors may employ Temporary Staff postpetition on an as-needed basis during peak seasons. The Debtors currently hire all Temporary Staff directly, however, the Debtors are considering retaining the services of a temporary staffing agency (such agency, the “**Temporary Staffing Agency**”) to assist the Debtors in hiring Temporary Staff in the future. As of the Petition Date, the Debtors believe that there are no amounts owed in connection with the retention of Temporary Staff.

**C. Employee Reimbursement Programs**

23. In the ordinary course of business, the Debtors reimburse eligible members of their Workforce by making various payments in connection with: (i) reimbursement of business expenses, (ii) payments on account of the Debtors’ Vehicle Program and Vehicle Fleet Program (each as defined below), (iii) reimbursement of Relocation Expenses (as defined below), (iv) Per-Diem (as defined below) payments, (v) reimbursement of certain Miscellaneous Reimbursement Programs (as defined below), and (vi) payment and reimbursement of the fees and expenses of the Debtors’ Independent Directors (as defined below, and, together (i) – (vi), the “**Employee Reimbursement Programs**” and, any obligations thereunder, the “**Employee**

**Reimbursement Obligations**”). The Employee Reimbursement Programs are described in further detail below.

**i. Business Expenses**

24. The Debtors, in the ordinary course of their business, reimburse Employees for a variety of ordinary, necessary, and reasonable business-related expenses that Employees incur within the scope of their job duties. These include expenses for business travel (including airfare, lodging, taxi costs, automobile rentals, meals, and internet charges), and other general business-related expenses. Employees are expected to use sound judgment and good business sense when incurring expenses.

25. In addition, approximately thirty-one Employees are furnished with corporate credit cards maintained through American Express (the “**AmEx Credit Cards**”). These Employees use the AmEx Credit Cards to make authorized business purchases on behalf of the Debtors. The Debtors pay the balances that accrue under the AmEx Credit Cards directly to American Express on a monthly basis. The Debtors are primarily liable for the amounts charged on the AmEx Credit Cards. The continued use of the AmEx Credit Cards is critical to the Debtors’ business operations insofar as it is one of the mechanisms by which Employee expenses incurred in the ordinary course of employment are efficiently paid. On average, for the twelve months prior to the Petition Date, the Debtors’ Employees incurred approximately \$145,000 per month in the aggregate on account of business expenses charged to the AmEx Credit Cards. The Debtors estimate approximately \$55,000 remains outstanding on account of prepetition business expenses charged to the AmEx Credit Cards as of the Petition Date.

26. All Employees whether they have been issued a credit card or not are required to submit expense reports. Expense reports include supporting receipts and are approved by Employee’s supervisors in order to be reimbursed. Employees are reimbursed for their work-

related expenses via direct deposit or check by the Debtors promptly after the expense report is approved by applicable manager and accounting staff. Employees are to submit their expense data within a reasonable time after incurring business expenses, however, because Employees may not always promptly furnish their receipts, it is difficult for the Debtors to determine the exact amount outstanding at any particular time. Taking into account a potential lag period, the Debtors estimate that, as of the Petition Date, their obligations to Employees for accrued, reimbursable business-related expenses (submitted and un-submitted) aggregate approximately \$65,000, inclusive of amounts owed in connection with the AmEx Credit Cards.

**ii. Vehicle Program and the Vehicle Fleet Program**

27. The Debtors offer certain Employees the ability to participate in a vehicle program (the “**Vehicle Program**”) through which eligible Employees who maintain vehicles meeting certain standards and who use such vehicles in the ordinary course of their employment with the Debtors, are provided a monthly vehicle allowance. Specifically, Employees that participate in the Vehicle Program receive an allowance of either (i) \$900 on average each month, or (ii) the IRS established standard mileage rates for the use of a car (vans, pickups or panel trucks), currently \$0.58 per mile for business-related travel costs and expenses. As of the Petition Date, approximately four Employees participate in the Vehicle Program. For the twelve months prior to the Petition Date, the average amount paid by the Debtors under the Vehicle Program was approximately \$3,000 per month. The Debtors estimate that accrued but unpaid amounts under the Vehicle Program total approximately \$5,000 as of the Petition Date.

28. The Debtors also own thirty-one and lease two vehicles located across the Debtors’ plants and headquarters that are available for use by the Debtors’ sales team and plant managers under the Debtors’ vehicle fleet program (the “**Vehicle Fleet Program**”). For the twelve months prior to the Petition Date, the average aggregate, monthly cost related to the

Vehicle Fleet Program, including, but not limited to, lease payments, maintenance and upkeep costs and gas, was approximately \$20,000<sup>9</sup>. The Debtors estimate that accrued but unpaid amounts under the Vehicle Fleet Program total approximately \$5,000 as of the Petition Date.

**iii. Relocation Expenses**

29. In the ordinary course of business, the Debtors cover relocation expenses if an Employee relocates at the request of the Debtors (the “**Relocation Expenses**”). The Debtors estimate there are no accrued but unpaid amounts under the Relocation Expenses as of the Petition Date.

**iv. Per-Diem**

30. The Debtors provide certain non-corporate, field Employees that have not been issued an AmEx Credit Card with a \$50 per-diem stipend (the “**Per-Diem**”) when such Employees are required to travel in connection with their employment with the Debtors. The Debtors issue the Per-Diem in connection with the Debtors’ bi-weekly payroll. For the twelve months prior to the Petition Date, the Debtors’ aggregate average monthly Per-Diem totaled approximately \$2,000. As of the Petition Date, the Debtors believe that there are no amounts owed in connection with the Per-Diem Obligations.

**v. Company-Owned Homes**

31. The Debtors own six homes (the “**Company-Owned Homes**”). One of the Company-Owned Homes is located near the Debtors’ operations Texas and five are located near the Debtors’ operations in Wisconsin. The Debtors rent the Company-Owned Homes to certain of their Employees. None of the Company-Owned Homes are subject to mortgage payments, however, the Debtors are responsible for *de minimis* maintenance and upkeep costs associated

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<sup>9</sup> Approximately \$15,000 of this amount was paid by Employees via the AmEx Credit Cards.

with the Company-Owned Homes per month. As of the Petition Date, the Debtors believe that there are no accrued and unpaid amounts owing on account of the Company-Owned Homes.

**vi. Miscellaneous Reimbursement Programs**

32. The Debtors also reimburse their Employees for certain other miscellaneous programs and benefits (the “**Miscellaneous Reimbursement Programs**”). For example, the Debtors may reimburse (or pay directly) certain professional expenses incurred by Employees, such as required continuing education expenses, professional license fees or dues, and subscriptions. In addition, Employees are reimbursed, up to certain annual limits, for the purchase of safety equipment, work boots, safety prescription glasses, and work uniforms. The Debtors also provide certain Employees with a cell phone allowance. The total amount of reimbursements paid by the Debtors under these Miscellaneous Reimbursement Programs average approximately \$15,000 per month for the twelve months prior to the Petition Date. As of the Petition Date, the Debtors estimate that accrued and unpaid amounts under the Miscellaneous Reimbursement Programs total approximately \$12,500.

**vii. Independent Director Fees and Expenses**

33. In the ordinary course of business, the Debtors pay fees for and reimburse expenses of five non-Employee independent members of Debtor, Emerge Energy Services GP (the “**Independent Directors**”). Three Independent Directors, Kevin Clark, Mark Gottfredson, and Francis J. Kelly III, are paid, in the aggregate, approximately \$46,000 on a quarterly basis for services conducted during the prior quarter. Two Independent Directors, Eugene Davis and William Transier, are paid, in the aggregate, approximately \$60,000 on a monthly basis for services to be conducted during that same month. The Independent Directors’ service is necessary for the continued management of the Debtors and, accordingly, it is essential that the Debtors be authorized to pay all Independent Director fees and any business related expenses

incurred by the Independent Directors that have accrued as of the Petition Date. As of the Petition Date, the Debtors estimate that the aggregate accrued but unpaid fees and expenses owed to the Independent Directors total approximately \$5,000.

**D. Employee Benefits Programs**

34. In the ordinary course of business, the Debtors offer eligible Employees, their eligible spouses and dependents, and certain former Employees various standard employee benefits, including, without limitation: (i) medical, prescription drug, dental, and vision coverage, (ii) participation in the HSAs (as defined below), (iii) participation in the Income Protection Plans (as defined below), (iv) the ability to participate in the 401(k) Program (as defined below), (v) workers' compensation, (vi) severance benefits, and (vii) the ability to participate in Supplemental Benefits Programs (as defined below, and, together (i) – (vii), the “**Employee Benefits Programs**” and, any obligations thereunder, the “**Employee Benefits Obligations**”). The Employee Benefits Programs are described in further detail below.

**i. Medical Benefits, Dental Benefits, and Vision Plan**

**a. Medical Benefits**

35. The Debtors offer eligible Employees and their family members the opportunity to obtain basic medical and prescription drug benefits (the “**Medical Benefits**”) under one of two plans that are each fully insured and administered by United Healthcare Services, Inc. (“**United Healthcare**”): a high-deductible health plan combined with a health savings account (the “**HDHP**”), and a PPO plan (the “**PPO Plan**” and, together with the HDHP, the “**United Healthcare Plans**”). The obligations incurred by the Debtors on account of the Medical Benefits fluctuate based on the medical needs of the Employees. For the twelve month period prior to the Petition Date, the Debtors incurred approximately \$260,000 on average per month in

connection with the Medical Benefits. As of the Petition Date, the Debtors believe that there are no accrued and unpaid amounts owing on account of the Medical Benefits.

36. In addition, as required under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“**COBRA**”), the Debtors provide, and Benefit Strategies, LLC (“**Benefit Strategies**”) administers, temporary continuation of healthcare benefits at group rates to former Employees after their termination, retirement, or disability leave. The former Employees bear all costs associated with COBRA. While the Debtors do not expect any costs to arise associated with this benefit, the Debtors request that former Employees and eligible dependents retain the right to coverage in accordance with COBRA requirements and request authorization to pay obligations (if any) arising under such plans, regardless of when such obligations accrued.

**b. Dental Benefits**

37. The Debtors also offer eligible Employees and their family members the opportunity to obtain basic dental coverage (the “**Dental Benefits**”). The Dental Benefits are insured and administered by United Healthcare. For the twelve month period prior to the Petition Date, the Debtors incurred approximately \$13,500 on average per month in connection with the Dental Benefits. As of the Petition Date, the Debtors believe that there are no amounts owed in connection with the Dental Benefits.

**c. Vision Plan**

38. The Debtors provide all Employees with the option to enroll in a vision insurance plan (the “**Vision Plan**”) that is administered and insured by VSP Global (“**VSP**”). The Vision Plan covers Employees’ routine eye exams, eyeglass frames and lenses, and contact lenses, to varying degrees depending on the service and whether the provider is within VSP’s network or is outside the network (the latter option being subject to higher costs to the Employee). On average, for the twelve months prior to the Petition Date, the Debtors remitted approximately



\$1,700 of employee-paid premiums on account of the Vision Plan. As of the Petition Date, the Debtors estimate that they are holding approximately \$2,000 of employee-paid premiums in connection with the Vision Plan.

**ii. The HSAs**

39. The Debtors offer all Employees participating in the HDHP the opportunity to contribute, through pre-tax compensation deductions, to health savings accounts (the “**HSAs**”) at Benefit Strategies to be used for healthcare-related expenses. In the aggregate, the Debtors contribute approximately \$25,000 per month to the HSAs in connection with those Employees who choose the HDHP. Each participating Employee may also contribute a portion of his or her eligible earnings each year on a pre-tax basis to his or her HSA, subject to limits imposed by federal law. A participating Employee may only use his or her HSA for eligible medical expenses.

40. On July 1, 2019 the Debtors transitioned the Medical Benefits and the Dental Benefits from Blue Cross Blue Shield and Metropolitan Life Insurance Company, respectively, to United Healthcare. In connection with the transition of the Medical Benefits to United Healthcare, the Debtors also transitioned the HSAs from HSA Bank to Benefit Strategies. The Debtors, will continue paying HSA Bank its administrative fees to maintain and administer the HSAs located at HSA Bank through October 1, 2019 in order to provide Employees with adequate time to transition HSA funds held at HSA Bank to Benefit Strategies. The Debtors anticipate incurring fees of approximately \$300 per month to HSA Bank in order to administer the HSAs during the transition period. As of the Petition Date, the Debtors estimate that they are holding HSA Deductions to be remitted to various HSAs of approximately \$25,000.

**iii. Income Protection Plans**

41. Eligible Employees receive, at the Debtors' cost, short-term disability insurance, long-term disability insurance, accidental death and dismemberment insurance, and basic life insurance, as well as supplemental life insurance (for which enrolled Employees bear the cost) (such insurance plans, the "**Income Protection Plans**"). The Income Protection Plans are administered by Mutual of Omaha Insurance Company.

42. For the twelve month period prior to the Petition Date, the Debtors incurred approximately \$13,500 on average per month in connection with the Income Protection Plans. In addition, on average, for the twelve months prior to the Petition Date, the Debtors remitted approximately \$13,000 of Employee-paid premiums per month on account of the Income Protection Plans. As of the Petition Date, the Debtors believe that there are no amounts owed on account of premiums under the Income Protection Plans.

**iv. 401(k) Plan**

43. The Debtors sponsor a 401(k) retirement savings plan (the "**401(k) Plan**") for eligible Employees. The 401(k) Plan is administered by BB&T Retirement Services ("**BB&T**"). Under the 401(k) Plan, an eligible Employee may contribute a portion of his or her eligible earnings each year through either pre-tax contributions, Roth contributions, or a combination thereof, to the 401(k) Plan, subject to limits imposed by federal law. These contributions are deducted from the paychecks of participating Employees and held in trust on the Employees' behalf until such amounts are paid to Emerge Energy Services GP LLC (in such capacity, the "**401(k) Trustee**") to be held in an account maintained by the 401(k) Trustee on the Employee's behalf. In addition, the 401(k) Plan permits Employees to take loans against their individual 401(k) account, and the Debtors deduct loan payments from such Employee's paycheck and

remit such amounts to the 401(k) Trustee. The 401(k) Trustee's administrative fees are deducted from 401(k) Plan assets. Currently, approximately 200 Employees participate in the 401(k) Plan.

44. The Debtors match Employee contributions up to 6% of the participating Employee's eligible compensation, subject to limits imposed by federal law. Matching contributions made on behalf of the Debtors' Employees during the twelve months prior to the Petition Date to the 401(k) Plan totaled approximately \$727,000. As of the Petition Date, the Debtors estimate that they owe approximately \$40,000 on account of prepetition matching contributions related to the 401(k) Plan.

**v. Workers' Compensation**

45. Under the laws of the various US states in which they operate, the Debtors are required to maintain workers' compensation policies and programs, or participate in workers' compensation programs administered by state governments, to provide their Employees with workers' compensation coverage for claims arising from or related to their employment with the Debtors. The Debtors' Employees are covered under a workers' compensation policy (the "**Workers' Compensation Policy**") issued by Starr Indemnity & Liability Co. ("**Starr Indemnity**") and administered by York Services. The Debtors pay monthly premiums in the amount of approximately \$34,000 with respect to the Workers' Compensation Policy. Under the Workers' Compensation Policy, upon the filing of a verified claim ("**Workers' Compensation Claim**") by an eligible Employee, Starr Indemnity pays the Workers' Compensation Claim amount directly to the Employee.

46. It is critical that the Debtors be permitted to continue their workers' compensation program and to make payments in connection with outstanding prepetition claims, taxes, charges, assessments, premiums, and third party administrator fees in the ordinary course of business because alternative arrangements for workers' compensation coverage would most

certainly be more costly, and the failure to provide coverage may subject the Debtors and/or their officers to severe penalties. To facilitate the ordinary course handling of Workers' Compensation Claims, the Debtors further request authority, in their sole discretion, to lift the automatic stay of section 362 of the Bankruptcy Code to allow Workers' Compensation Claims to proceed under the Workers' Compensation Policy and to allow the Debtors, their affiliates, their insurance providers and/or their third party administrators to negotiate, settle and/or litigate Workers' Compensation Claims, and pay resulting amounts, whether such claims arose before or after the Petition Date. As of the Petition Date, the Debtors have no accrued but unpaid liability on account of the Workers' Compensation Policy.

**vi. Severance Plan**

47. The Debtors maintain a severance plan (the "**Severance Plan**") with respect to certain Employees who are involuntarily terminated by the Debtors due to a job elimination, restructuring, merger, acquisition, divestiture, unit shutdown, departmental consolidation, technological change or similar business reason. As of the Petition Date, approximately fourteen Employees have been awarded a severance package under the Severance Plan. Such Employees may receive six months' base pay plus an additional week of base pay for every completed year of service after the first year of service, capped at twenty-four months' base pay. Severance benefits under the Severance Plan are typically provided in exchange for a release in liability for the Debtors. Accordingly, the Debtors believe that it is important that they have the flexibility to maintain their current practice of honoring their severance program for Employee retention and morale. As of the Petition Date, the Debtors have no accrued but unpaid liability on account of the Severance Plan. The Debtors seek to continue providing such benefits in the ordinary course of business to eligible non-insider Employees, subject to section 503(c) of the Bankruptcy Code.

**vii. Supplemental Benefits Programs**

48. The Debtors offer the following additional benefit programs to their Employees (collectively, the “**Supplemental Benefits Programs**”): (i) legal/identity theft protection services offered through LegalShield, and (ii) cancer, critical care, and hospitalization insurance offered through AFLAC Inc. All costs associated with the Supplemental Benefits Programs are paid by the enrolled Employees through bi-weekly paycheck Deductions. As of the Petition Date, the Debtors have no accrued but unpaid liabilities on account of the Supplemental Benefits Programs.

**E. Honoring of Prepetition Workforce Obligations**

49. The Debtors request authority to pay or provide, as they become due, all prepetition Workforce Obligations that are described in Sections B, C, and D of this Motion. The Debtors estimate that the aggregate amount of the prepetition Workforce Obligations described above is approximately \$1,060,000. Estimated outstanding amounts as of the Petition Date are summarized in further detail below:

<b>Workforce Obligations</b>	<b>Approximate Outstanding Prepetition Amount</b>
<i>Workforce Compensation Programs</i>	
i. Employee payroll obligations (inclusive of Deductions)	\$900,000 <sup>10</sup>
ii. PTO	\$0 <sup>11</sup>

<sup>10</sup> The Debtors estimate that, as of the Petition Date, they are holding Deductions aggregating approximately \$350,000 which the Debtors seek to pay to third parties in accordance with their prepetition practice.

<sup>11</sup> The Debtors estimate that, as of the Petition Date, aggregate accrued but unpaid PTO liability for all Employees totals approximately \$425,000. This accrued amount, however, does not represent a true “cash” liability for the Debtors, as the Debtors anticipate that Employees will use most of their PTO in the ordinary course of business, and eligible Employees receive cash payments on account of unused Earned Time Off upon termination or resignation. In addition, as described above, eligible Employees have the option to request payout of their accrued PTO balance of up to 40 hours. The maximum potential associated liability that would be

<b>Workforce Obligations</b>	<b>Approximate Outstanding Prepetition Amount</b>
iii. Employee Incentive Programs	\$0
iv. Payments to Recruiting Agency and Temporary Staffing Agency	\$0
<b>TOTAL</b>	<b>\$900,000</b>
<b><i>Employee Reimbursement Programs</i></b>	
i. Business expenses	\$65,000
ii. Vehicle Program and Vehicle Fleet Program	\$10,000
iii. Relocation Expenses	\$0
iv. Per-Diem	\$0
v. Company-Owned Homes	\$0
vi. Miscellaneous Reimbursement Programs	\$12,500
vii. Independent Director fees and expenses	\$5,000
<b>TOTAL</b>	<b>\$92,500</b>
<b><i>Employee Benefits Programs</i></b>	
i. Medical Benefits, Dental Benefits, and Vision Plan	\$2,500
ii. HSAs	\$25,000
iii. Income Protection Plans	\$0
iv. 401(k) Plan	\$40,000
v. Workers Compensation Policy	\$0
vi. Severance Plan	\$0
vii. Supplemental Benefits Programs	\$0
<b>TOTAL</b>	<b>\$67,500</b>

50. Due to the disruption and uncertainty that typically accompanies a Chapter 11 filing, the Debtors believe that the continuity and competence of their Workforce would be jeopardized if the relief requested herein is not granted. Specifically, if the Debtors fail to honor and pay prepetition Employee Compensation Obligations, Employee Reimbursement

(cont'd from previous page)

due to such Employees, should they all request this payout would be \$235,000, which amount is included in the \$425,000 PTO liability.

Obligations and Employee Benefits Obligations, in the ordinary course of business, the Debtors' Workforce will suffer extreme personal hardship and, in some cases, may be unable to pay their basic living expenses. This hardship would have a highly negative impact on Workforce morale and productivity, thereby resulting in immediate and irreparable harm to the Debtors' continuing operations and their estates. Accordingly, the Debtors have determined that payment of these amounts is vital to preventing the loss of key members of the Workforce during the pendency of the Chapter 11 Cases and to maintaining the continuity and stability of the Debtors' operations.

**F. Postpetition Continuation of Workforce Programs**

51. The Debtors also request confirmation of their right to continue to honor and perform their obligations with respect to all of the Workforce Programs. The Workforce Programs are essential to the Debtors' efforts to maintain Workforce morale, reward performance through certain incentives, minimize attrition, and preserve the continuity and stability of the Debtors' operations. The Debtors believe that the expenses associated with the Workforce Programs are reasonable and cost-efficient in light of the potential attrition, loss of morale, loss of productivity, and disruption of business operations that would occur if the Workforce Programs were discontinued. Notwithstanding the foregoing, the Debtors reserve the right to evaluate all Workforce Programs and to make such modifications, including terminating any particular plan, program, or policy, as may be necessary or appropriate during the pendency of the Chapter 11 Cases.

**G. Payments to Administrators**

52. With respect to the Employee compensation and benefits described above, the Debtors contract with several vendors to administer and deliver payments or other benefits to their Employees (the "**Administrators**"). The Debtors pay these Administrators' fees and expenses incurred in connection with providing such services. For example, in the ordinary

course of business the Debtors pay fees to Administrators, including, but not limited to, (i) \$20,000 quarterly to UltiPro in connection with payroll administration and tracking, (ii) \$300 monthly to HSA Bank in connection with the administration of the HSAs (through October 1, 2019), (iii) \$300 monthly to Benefit Strategies in connection with the administration of the HSAs, and (iv) \$4,600 monthly to BB&T in connection with the administration of the 401(k) Plan. As of the Petition Date, the Debtors estimate they owe approximately \$5,000 to the Administrators.

53. In conjunction with the Debtors' payment of prepetition Workforce Obligations and continued performance under Workforce Programs, the Debtors believe that it is necessary to obtain specific authorization to pay any claims of the Administrators on a postpetition basis, including prepetition claims to the extent necessary, to ensure uninterrupted delivery of certain benefits to the Workforce. The Debtors believe that the Administrators may fail to adequately and timely perform or may terminate their services to the Debtors unless the Debtors pay the Administrators' prepetition claims for administrative services rendered and expenses incurred. A need to engage replacement Administrators postpetition likely would cause significant disruption to the payment of benefits and other obligations to the Workforce. Accordingly, the Debtors submit that the payment of claims owed to the Administrators is in the best interest of the Debtors' estates.

#### **H. Honoring of Prepetition Checks**

54. Prior to the Petition Date, the Debtors paid certain of their prepetition Workforce Obligations with checks that had not been presented for payment as of the Petition Date. In order to ensure the orderly payment of the prepetition Workforce Obligations, the Debtors request that the Court enter an order authorizing the Debtors' banks to honor any such checks that are drawn on the Debtors' accounts, and authorizing the banks to rely on the representations



of the Debtors as to which checks are subject to this Motion. To the extent that any such checks are nevertheless refused payment, the Debtors additionally request authority to replace any checks or electronic fund transfers that may be dishonored and to reimburse any related expenses that may be incurred as a result of any bank's failure to honor a prepetition check or electronic fund transfer.

### **APPLICABLE AUTHORITY**

#### **A. Payment of the Priority Portion of Prepetition Workforce Obligations Should be Authorized Under Section 507(a) of the Bankruptcy Code**

55. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code require that certain claims for prepetition wages, salaries, and vacation pay be accorded priority in payment in an amount not to exceed \$13,650 for each individual. In chapter 11, priority claims must be paid in full. Accordingly, granting the relief requested with respect to the priority portion of prepetition Workforce Obligations will not adversely affect the Debtors' other unsecured creditors.

56. The Debtors believe that, as of the Petition Date, no Employees are owed wages or salary compensation in excess of the \$13,650 statutory cap pursuant to section 507(a)(4) of the Bankruptcy Code, and in any event, the Debtors do not seek to pay any such Employee in excess of such cap pursuant to this Motion. The amounts of certain prepetition Workforce Obligations, such as Employee Benefits Obligations, are unknown pending submission of claims and, therefore, the Debtors do not know the exact amount due on account of each Employee for the prepetition period. To the extent that Employees are owed aggregate amounts in excess of the priority cap, or amounts that are otherwise not entitled to priority status, the Debtors submit that payment of prepetition Workforce Obligations in such higher amounts or otherwise non-priority amounts is nonetheless justified under the authority discussed below. The Debtors only intend to seek such relief upon entry of the Final Order.

**B. The Proposed Payments are Appropriate under Section 363(b) of the Bankruptcy Code**

57. Under section 363 of the Bankruptcy Code, a bankruptcy court is empowered to authorize a chapter 11 debtor to expend funds in the bankruptcy court's discretion outside the ordinary course of business. *See* 11 U.S.C. § 363(b). In order to obtain approval for the use of estate assets outside the ordinary course of business, the debtor must articulate a valid business justification for the requested use. *See In re Iridium Operating LLC*, 478 F.3d 452, 466 (2d Cir. 2007). To the extent the payment of prepetition wages, expenses and benefits are deemed to be outside the ordinary course of business, the preservation and protection of a debtor's business, the retention of a debtor's currently working employees, and the maintenance of positive employee morale provide a sufficient business justification for such payment. *See Id.* Accordingly, this Court should grant the requested relief under section 363(b) of the Bankruptcy Code.

**C. Payment of Certain of the Prepetition Workforce Obligations is Appropriate under Section 541 of the Bankruptcy Code**

58. The payment of the Employee contribution component of the 401(k) Plan or payment of garnished wages and other similar other Deductions will not prejudice the Debtors' estates because such withholdings are derived from Employee funds and held in trust for the benefit of the related payees and, thus, do not constitute property of the Debtors' estates under section 541 of the Bankruptcy Code. *See Begier v. IRS*, 496 U.S. 53, 58-59 (1990). *See also In re Columbia Gas Sys., Inc.*, 997 F.2d 1039, 1059 (3d Cir. 1993) (concluding that property that debtor holds in trust – either express or constructive – for another does not become property of the estate when the debtor files for bankruptcy, and stating that “Congress clearly intended the exclusion by section 541(d) to include not only funds held in express trust, but also funds held in constructive trust.”); *EBS Pension L.L.C. v. Edison Bros. Stores, Inc. (In re Edison Bros., Inc.)*,

243 B.R. 231 (Bankr. D. Del. 2000) (same). Moreover, payments that are critical to the retention and morale of the Debtors' Workforce actually add value to the estates because an unplanned reduction in Employee retention or productivity could have disastrous effects on any potential recoveries to unsecured creditors.

**D. Payment of Prepetition Workforce Obligations is Authorized under Sections 1107 and 1108 of the Bankruptcy Code**

59. 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.*

60. According to the *CoServ* court, there are instances in which a debtor in possession can fulfill its fiduciary duty "only . . . by the preplan satisfaction of a prepetition claim." *See Id.* The *CoServ* court specifically noted 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." *Id.* 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.* at 498.

61. Payment of prepetition Workforce Obligations meets each element of the *CoServ* court's standard. First, any failure by the Debtors to pay prepetition Workforce Obligations would have a severe negative impact on the morale of the Debtors' Workforce at a critical time for the Debtors and their businesses. Moreover, as described above, the Employees likely maintain priority claims against the Debtors many of the prepetition Workforce Obligations.

62. Second, the potential harm and economic disadvantage that would stem from the failure to pay prepetition Workforce Obligations is grossly disproportionate to the amount of any prepetition claim that may be paid. Absent payment of prepetition Workforce Obligations, Workforce morale would decrease dramatically, likely leading to the loss of key personnel and other severe business disruptions costing far in excess of the amount of such obligations.

63. Third, the Debtors have examined other options short of payment of prepetition Workforce Obligations and have determined that to avoid significant disruption of the Debtors' business operations there exists no practical or legal alternative to payment of such obligations. 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 prepetition Workforce Obligations.

**E. Section 105(a) of the Bankruptcy Code and the Doctrine of Necessity Support Payment of Prepetition Workforce Obligations**

64. The proposed payments of prepetition Workforce Obligations should be authorized pursuant to section 105(a) of the Bankruptcy Code, which authorizes this Court "to issue any order . . . necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105. For the reasons set forth herein, and in light of the critical need for the Debtors to preserve the going concern value of their businesses in order to effect a successful reorganization through, among other things, preservation of the Debtors' Workforce and its

morale and productivity, payment of prepetition Workforce Obligations as requested herein is proper in accordance with section 105(a) of the Bankruptcy Code.

65. Payment of prepetition Workforce Obligations 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 reorganization process where the payment of such claims is necessary to the reorganization. *See In re Just for Feet, Inc.*, 242 B.R. 821, 826 (Bankr. D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment);<sup>12</sup> *see also In re Wehrenberg, Inc.*, 260 B.R. 468, 469 (Bankr. E.D. Mo. 2001) (“Pursuant to 11 U.S.C. § 105(a) the Court may authorize the payment of prepetition claims when such payments are necessary to the continued operation of the Debtor.”); *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.”).

66. The doctrine of necessity is a widely accepted component of modern bankruptcy jurisprudence. *See Just For Feet*, 242 B.R. at 826 (approving payment of key inventory suppliers’ prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new inventory on eve of debtor’s key sales season); *In re Payless Cashways, Inc.*, 268

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<sup>12</sup> 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 & Sw. Ry. 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 570, 581-82 (3d Cir. 1981) (“[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.”).

B.R. 543, 546-47 (Bankr. W.D. Mo. 2001) (authorizing payment of critical prepetition suppliers' claims when such suppliers agree to provide postpetition trade credit); *see also In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-92 (Bankr. D. Del. 1994); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175-76 (Bankr. S.D.N.Y. 1989).

67. For the reasons discussed herein, it is evident that payment of prepetition Workforce Obligations is necessary to the achievement of the Debtors' chapter 11 objectives. In particular, without payment of the prepetition Workforce Obligations, the Debtors' businesses and operations will be detrimentally impacted through the reduction in Workforce morale and the potential loss of key personnel during a critical time for the Debtors and their businesses. Hence, this Court should exercise its equitable powers to grant the relief requested in this Motion.

**F. A Limited Waiver of the Automatic Stay for Workers' Compensation Claims is Appropriate**

68. Section 362(a) of the Bankruptcy Code operates to stay "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . ." 11 U.S.C. § 362(a)(1).

69. Section 362 of the Bankruptcy Code, however, permits a debtor or other parties in interest to request a modification or termination of the automatic stay for "cause." *Id.* at § 362(d)(1). Cause exists here to modify the automatic stay to permit the Employees to proceed with Workers' Compensation Claims in the appropriate judicial or administrative forum. Staying the Workers' Compensation Claims could have a detrimental effect on the financial well-being and morale of the Employees.

70. Similarly, state law requires the Debtors to maintain the Workers' Compensation Policies and related programs. If the Debtors fail to maintain the Workers' Compensation Policies, state law may prohibit the Debtors from operating in the various states in which they operate. Payment of all amounts relating to the Workers' Compensation Policy and related programs is therefore crucial to the Debtors' continued operations and the success of the Debtors' restructuring.

**G. Precedent Cases Support the Requested Relief**

71. Numerous courts, including this Court, have permitted the payment of prepetition compensation, benefits, and reimbursable expenses on the first day or in the early stages of chapter 11 bankruptcy cases. *See, e.g., In re White Star Petroleum Holdings, LLC*, Case No. 19-11179 (BLS) Bankr. D. Del. May 29, 2019); *In re Hexion Holdings LLC*, Case No. 19-10684 (KG) (Bankr. D. Del. Apr. 1, 2019); *In re Imerys Talc America 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. Sept. 14, 2018); *In re J & M Sales Inc.*, Case No. 18-11801 (LSS); (Bankr. D. Del. Aug. 27, 2018); *In re Enduro Resource Partners LLC*, Case No. 18-11174 (KG) (Bankr. D. Del. Jun. 8, 2018); *In re Claire's Stores, Inc.*, Case No. 18-10584 (MFW) (Bankr. D. Del. Apr. 17, 2018).

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

72. 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.

73. 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.

#### **RESERVATION OF RIGHTS**

74. 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.



### CONSENT TO JURISDICTION

75. 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

76. 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; (vii) the Administrators; and (viii) 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.

77. A copy of this Motion is available on (i) the Court’s website: [www.deb.uscourts.gov](http://www.deb.uscourts.gov), and (ii) the website maintained by the Debtors’ proposed Claims and Noticing Agent, Kurtzman Carson Consultants LLC, [www.kccllc.net/EmergeEnergy](http://www.kccllc.net/EmergeEnergy).

### NO PRIOR REQUEST

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

*[Remainder of page intentionally left blank]*

**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/ Zachary I. Shapiro

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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, *et al.*,<sup>1</sup> : Case No. 19-\_\_\_\_\_ (\_\_\_\_\_)  
 :  
 Debtors. : (Joint Administration Requested)  
 :  
 ----- X

**INTERIM ORDER (I) AUTHORIZING (A) PAYMENT OF PREPETITION  
WORKFORCE OBLIGATIONS AND (B) CONTINUATION OF WORKFORCE  
PROGRAMS ON POSTPETITION BASIS, (II) AUTHORIZING PAYMENT OF  
PAYROLL-RELATED TAXES, (III) CONFIRMING THE DEBTORS’ AUTHORITY TO  
TRANSMIT PAYROLL DEDUCTIONS, (IV) AUTHORIZING PAYMENT OF  
PREPETITION CLAIMS OWING TO ADMINISTRATORS, AND (V)  
DIRECTING BANKS TO HONOR PREPETITION CHECKS AND FUND  
TRANSFERS FOR AUTHORIZED PAYMENTS**

Upon the motion (the “Motion”)<sup>2</sup> of the Debtors for entry of an Interim Order under sections 105(a), 362(d), 363(b), 507(a), 541, 553, 1107(a), and 1108 of the Bankruptcy Code, and Bankruptcy Rule 6003 (i) authorizing the Debtors to (a) pay certain prepetition amounts for compensation, benefits, and reimbursable expenses owing to or for the benefit of the Debtors’ Workforce and (b) continue the Workforce Programs in the ordinary course of business postpetition, as in effect immediately prior to the filing of the Chapter 11 Cases; (ii) confirming that the Debtors are authorized to pay any and all local, state and federal withholding and payroll-related or similar taxes relating to prepetition periods; (iii) confirming that the Debtors are permitted, but not required, to continue to deduct and to transmit deductions from payroll

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

checks as authorized by Employees, as required by any Workforce-related plan, program or policy, or as required by law; (iv) authorizing the Debtors to pay any prepetition claims owing to the Administrators; and (v) authorizing and directing all banks to receive, process, honor, and pay all of the Debtors' prepetition checks and fund transfers on account of any obligations authorized to be paid hereunder; 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 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 pay or otherwise honor all prepetition Workforce Obligations to, or for the benefit of, the Workforce including, but not limited to, all prepetition amounts owed in connection with (i) the Workforce Compensation Obligations, (ii) the Employee Reimbursement Obligations, and (iii) the Employee Benefits

Obligations, each as described in the Motion. Notwithstanding any other provision of this Interim Order, such payments shall not exceed \$1,000,000 in the aggregate without further order of the Court. Such Workforce Obligations are summarized in further detail in the chart below.

<b>Workforce Obligations</b>	<b>Estimated Interim Amount</b>
<b><i>Workforce Compensation Programs</i></b>	
i. Employee payroll obligations (inclusive of Deductions)	\$900,000
ii. PTO	\$0
iii. Employee Incentive Programs	\$0
iv. Payments to Recruiting Agency and Temporary Staffing Agency	\$0
<b>TOTAL</b>	<b>\$900,000</b>
<b><i>Employee Reimbursement Programs</i></b>	
i. Business expenses	\$10,000
ii. Vehicle Program and Vehicle Fleet Program	\$10,000
iii. Relocation Expenses	\$0
iv. Per-Diem	\$0
v. Company-Owned Homes	\$0
vi. Miscellaneous Reimbursement Programs	\$12,500
vii. Independent Director fees and expenses	\$0
<b>TOTAL</b>	<b>\$32,500</b>
<b><i>Employee Benefits Programs</i></b>	
i. Medical Benefits, Dental Benefits, and Vision Plan	\$2,500
ii. HSAs	\$25,000
iii. Income Protection Plans	\$0
iv. 401(k) Plan	\$40,000
v. Workers Compensation Policy	\$0
vi. Severance Plan	\$0
vii. Supplemental Benefits Programs	\$0
<b>TOTAL</b>	<b>\$67,500</b>

3. Except as otherwise expressly set forth in this Interim Order, the Debtors are authorized to (i) continue each of the Workforce Programs, including but not limited to, the Workforce Compensation Programs, the Employee Reimbursement Programs and the Employee Benefits Programs, each as described in the Motion, in the ordinary course of business during the pendency of the Chapter 11 Cases in the manner and to the extent that such Workforce Programs were in effect immediately prior to the filing of the Chapter 11 Cases, and (ii) continue to fund and to make payments in connection with the costs of and the expenses incurred in the administration of any Workforce Program, including but not limited to, the Workforce Compensation Programs, the Employee Reimbursement Programs, and the Employee Benefits Programs, as described in the Motion, in the ordinary course of business.

4. Nothing herein shall be deemed to authorize the Debtors to cash out unpaid PTO except upon termination of an Employee and to the extent required by applicable non-bankruptcy law.

5. Subject to the caps set forth in paragraph 2, 8 and 19 of this Interim Order, the Debtors are authorized to reimburse the Employees for all Employee Reimbursement Obligations incurred prior to the Petition Date. In addition, the Debtors are authorized to make direct payments to third parties on account of amounts owed in connection with the Employee Reimbursement Obligations.

6. The Debtors are authorized to continue their Workers' Compensation Policy and to pay any outstanding prepetition claims, taxes, charges, assessments, premiums, and third party administrator fees arising under the Workers' Compensation Policy and or programs in which they participate. In addition, the automatic stay of section 362(d) of the Bankruptcy Code is hereby lifted to allow the Debtors' Employees to proceed with any Workers' Compensation

Claims they may have under the Workers' Compensation Policy and to allow the Debtors' insurance providers and/or third party administrators to negotiate, settle, and/or litigate such claims, and pay resulting amounts, whether such claims arose before or after the Petition Date.

7. The Debtors are authorized to withhold, pay and/or transmit any and all amounts attributable to the Deductions, including but not limited, to paying withholding and payroll-related taxes and fees related to the Workforce Obligations, social security taxes, and Medicare taxes, as required by any Workforce-related plan, program or policy, or as required by law, whether such amounts relate to the period before or after the Petition Date.

8. The Debtors are authorized to pay amounts owed in connection with claims of the Administrators in connection with administering and delivering payments or providing other services and benefits to the Workforce for prepetition services rendered and claims for reimbursement based on prepetition disbursements made by the Administrators. Notwithstanding any other provision of this Interim Order, such payments to Administrators shall not exceed \$5,000 in the aggregate without further order of the Court.

9. The Debtors are authorized, but not directed, to pay prepetition amounts owed to the Independent Directors and may continue to make such payments on a postpetition basis in the ordinary course of business.

10. Nothing herein shall authorize the Debtors to make payments under the Employee Incentive Programs.

11. Subject to entry of the Final Order, the Debtors are authorized to continue the Severance Plan on a postpetition basis in the ordinary course of business and to pay any accrued amounts thereunder as they become due; *provided that*, nothing herein shall be deemed to



authorize the payment of any amounts in satisfaction of bonus or severance obligations, or other amounts which are subject to section 503(c) of the Bankruptcy Code.

12. The Debtors' banks and financial institutions shall be, and hereby are, authorized, when requested by the Debtors in their sole discretion, to process, honor, and pay any and all checks or electronic fund transfers drawn on the Debtors' bank accounts to pay all prepetition amounts owed to any party in connection with prepetition Workforce Obligations, whether those checks were presented prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments. Further, the Debtors are authorized to issue new postpetition checks and initiate new postpetition electronic fund transfers to replace any checks or electronic fund transfers that may be dishonored and to reimburse any related expenses that may be incurred as a result of any bank's failure to honor a prepetition check or electronic fund transfer.

13. The Debtors' banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Interim Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors as provided for in this Interim Order.

14. Authorization to pay, and the payment of, any amounts on account of prepetition Workforce Obligations, including any amounts on account of the Workforce Compensation Obligations, the Employee Reimbursement Obligations, and/or the Employee Benefits Obligations, shall not affect the Debtors' right to contest the amount or validity of any such prepetition Workforce Obligation, including without limitation, any amounts that may be due to any taxing authority.

15. Neither the provisions of this Interim Order, nor any payments made or not made by the Debtors pursuant to this Interim Order, shall be deemed an assumption or rejection of any Workforce Program, agreement or contract, or otherwise affect the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract between the Debtors and any member of the Workforce, or other person.

16. Notwithstanding anything to the contrary in this Interim Order, the Debtors retain their right to modify or terminate any Workforce Program to the extent that such right exists under the terms of the Workforce Program or as may be required by applicable law; provided, however, that the Debtors shall seek court approval, on notice, of any modification that would implicate any portion of section 503(c) of the Bankruptcy Code.

17. Notwithstanding the relief granted herein or any actions taken hereunder, nothing contained in this Interim Order shall create any rights in favor of, or enhance, limit or change the status of any claim held by, any member of the Workforce, or other person.

18. Neither the provisions contained herein, nor any actions or payments made by the Debtors pursuant to this Interim Order, shall be deemed an admission as to the validity of any underlying obligation or a waiver of any rights the Debtors may have to dispute such obligation on any ground that applicable law permits.

19. Notwithstanding any other provision of this Interim Order and subject to entry of the Final Order, no payments to any individual Employee or Temporary Staff pursuant to this Interim Order on account of prepetition obligations shall exceed the amounts set forth in 11 U.S.C. §§ 507(a)(4) and 507(a)(5).

20. The contents of the Motion satisfy the requirements of Bankruptcy Rules 6003(b).

21. The requirements set forth in Bankruptcy Rule 6004(a) are hereby waived.

22. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order are immediately effective and enforceable upon its entry.

23. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Interim Order in accordance with the Motion.

24. 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.

25. 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 (a) the First Lien Administrative Agent and Collateral Agent for the Debtors' prepetition Second Amended and Restated Revolving Credit and Security Agreement, (b) the Second Lien Notes Agent and Collateral Agent for the Debtors' prepetition Second Lien Note Purchase Agreement, and (c) the DIP Agent, 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)); (v) local counsel to (a) the First Lien Administrative Agent and Collateral Agent for the Debtors' prepetition Second Amended and Restated Revolving Credit and Security Agreement, (b) the Second Lien Notes Agent and Collateral Agent for the Debtors' prepetition Second Lien Note Purchase Agreement, and (c) the DIP Agent, Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, Wilmington, Delaware 19801 (Attn: Laura Davis Jones, Esq. (email: ljones@pszjlaw.com)); (vi) counsel to any statutory committee appointed in these cases, if any; and (vii) the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Wilmington, DE 19801 (Attn: 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.

26. 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, *et al.*,<sup>1</sup> : Case No. 19-\_\_\_\_\_ (\_\_\_\_\_)  
 :  
 Debtors. : (Jointly Administered)  
 :  
 ----- X

**FINAL ORDER (I) AUTHORIZING (A) PAYMENT OF PREPETITION WORKFORCE OBLIGATIONS AND (B) CONTINUATION OF WORKFORCE PROGRAMS ON POSTPETITION BASIS, (II) AUTHORIZING PAYMENT OF PAYROLL-RELATED TAXES, (III) CONFIRMING THE DEBTORS’ AUTHORITY TO TRANSMIT PAYROLL DEDUCTIONS, (IV) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OWING TO ADMINISTRATORS, AND (V) DIRECTING BANKS TO HONOR PREPETITION CHECKS AND FUND TRANSFERS FOR AUTHORIZED PAYMENTS**

Upon the motion (the “**Motion**”)<sup>2</sup> of the Debtors for entry of a Final Order under sections 105(a), 362(d), 363(b), 507(a), 541, 553, 1107(a), and 1108 of the Bankruptcy Code, and Bankruptcy Rule 6003 (i) authorizing the Debtors to (a) pay certain prepetition amounts for compensation, benefits, and reimbursable expenses owing to or for the benefit of the Debtors’ Workforce and (b) continue the Workforce Programs in the ordinary course of business postpetition, as in effect immediately prior to the filing of the Chapter 11 Cases; (ii) confirming that the Debtors are authorized to pay any and all local, state and federal withholding and payroll-related or similar taxes relating to prepetition periods; (iii) confirming that the Debtors are permitted, but not required, to continue to deduct and to transmit deductions from payroll

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<sup>1</sup> 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, Ft. Worth, TX 76109.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

checks as authorized by Employees, as required by any Workforce-related plan, program or policy, or as required by law; (iv) authorizing the Debtors to pay any prepetition claims owing to the Administrators; and (v) authorizing and directing all banks to receive, process, honor, and pay all of the Debtors' prepetition checks and fund transfers on account of any obligations authorized to be paid hereunder; and the Court having reviewed the Motion and 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 after due deliberation thereon; and the Court having 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 as set forth herein on a final basis.
2. All objections to the entry of this Final Order, to the extent not withdrawn or settled, are overruled.
3. The Debtors are authorized, but not directed, to pay or otherwise honor all prepetition Workforce Obligations to, or for the benefit of, the Workforce, including but not limited to, all prepetition amounts owed in connection with (i) the Workforce Compensation

Obligations, (ii) the Employee Reimbursement Obligations, and (iii) the Employee Benefits Obligations, each as described in the Motion. Notwithstanding any other provision of this Final Order, such payments shall not exceed \$1,060,000 in the aggregate without further order of the Court. Such Workforce Obligations are summarized in further detail in the chart below.

<b>Workforce Obligations</b>	<b>Approximate Outstanding Prepetition Amount</b>
<b><i>Workforce Compensation Programs</i></b>	
i. Employee payroll obligations (inclusive of Deductions)	\$900,000
ii. PTO	\$0
iii. Employee Incentive Programs	\$0
iv. Payments to Recruiting Agency and Temporary Staffing Agency	\$0
<b>TOTAL</b>	<b>\$900,000</b>
<b><i>Employee Reimbursement Programs</i></b>	
i. Business expenses	\$65,000
ii. Vehicle Program and Vehicle Fleet Program	\$10,000
iii. Relocation Expenses	\$0
iv. Per-Diem	\$0
v. Company-Owned Homes	\$0
vi. Miscellaneous Reimbursement Programs	\$12,500
vii. Independent Director fees and expenses	\$5,000
<b>TOTAL</b>	<b>\$92,500</b>
<b><i>Employee Benefits Programs</i></b>	
i. Medical Benefits, Dental Benefits, and Vision Plan	\$2,500
ii. HSAs	\$25,000
iii. Income Protection Plans	\$0
iv. 401(k) Plan	\$40,000
v. Workers Compensation Policy	\$0
vi. Severance Plan	\$0
vii. Supplemental Benefits Programs	\$0
<b>TOTAL</b>	<b>\$67,500</b>



4. Except as otherwise expressly set forth in this Final Order, the Debtors are authorized to (i) continue each of the Workforce Programs, including but not limited to, the Workforce Compensation Programs, the Employee Reimbursement Programs and the Employee Benefits Programs, each as described in the Motion, in the ordinary course of business during the pendency of the Chapter 11 Cases in the manner and to the extent that such Workforce Programs were in effect immediately prior to the filing of the Chapter 11 Cases, and (ii) continue to fund and to make payments in connection with the costs of and the expenses incurred in the administration of any Workforce Program, including but not limited to, the Workforce Compensation Programs, the Employee Reimbursement Programs, and the Employee Benefits Programs, as described in the Motion, in the ordinary course of business.

5. Subject to the caps set forth in paragraph 3, 8 and 19 of this Final Order, the Debtors are authorized to reimburse the Employees for all Employee Reimbursement Obligations incurred prior to the Petition Date. In addition, the Debtors are authorized to make direct payments to third parties on account of amounts owed in connection with the Employee Reimbursement Obligations.

6. The Debtors are authorized to continue their Workers' Compensation Policy and to pay any outstanding prepetition claims, taxes, charges, assessments, premiums, and third party administrator fees arising under the Workers' Compensation Policy and or programs in which they participate. In addition, the automatic stay of section 362(d) of the Bankruptcy Code is hereby lifted to allow the Debtors' Employees to proceed with any Workers' Compensation Claims they may have under the Workers' Compensation Policy and to allow the Debtors' insurance providers and/or third party administrators to negotiate, settle, and/or litigate such claims, and pay resulting amounts, whether such claims arose before or after the Petition Date.

7. The Debtors are authorized to withhold, pay and/or transmit any and all amounts attributable to the Deductions, including but not limited to, paying withholding and payroll-related taxes and fees related to the Workforce Obligations, social security taxes, and Medicare taxes, as required by any Workforce-related plan, program or policy, or as required by law, whether such amounts relate to the period before or after the Petition Date.

8. The Debtors are authorized to pay amounts owed in connection with claims of the Administrators in connection with administering and delivering payments or providing other services and benefits to the Workforce for prepetition services rendered and claims for reimbursement based on prepetition disbursements made by the Administrators. Notwithstanding any other provision of this Final Order, such payments to Administrators shall not exceed \$5,000 in the aggregate without further order of the Court.

9. The Debtors are authorized, but not directed, to pay prepetition amounts owed to the Independent Directors and may continue to make such payments on a postpetition basis in the ordinary course of business.

10. Nothing herein shall authorize the Debtors to make payments under the Employee Incentive Programs.

11. The Debtors are authorized to continue the Severance Plan on a postpetition basis in the ordinary course of business and to pay any accrued amounts thereunder as they become due; *provided that*, nothing in this Final Order shall be deemed to authorize the payment of any amounts in satisfaction of bonus or severance obligations, or amounts which are subject to section 503(c) of the Bankruptcy Code.

12. The Debtors' banks and financial institutions shall be, and hereby are, authorized, when requested by the Debtors in their sole discretion, to process, honor, and pay any and all

checks or electronic fund transfers drawn on the Debtors' bank accounts to pay all prepetition amounts owed to any party in connection with the Prepetition Workforce Obligations, whether those checks were presented prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments. Further, the Debtors are authorized to issue new postpetition checks and initiate new postpetition electronic fund transfers to replace any checks or electronic fund transfers that may be dishonored and to reimburse any related expenses that may be incurred as a result of any bank's failure to honor a prepetition check or electronic fund transfer.

13. The Debtors' banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Final Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtors as provided for in this Final Order.

14. Authorization to pay, and the payment of, any amounts on account of prepetition Workforce Obligations, including any amounts on account of the Workforce Compensation Obligations, the Employee Reimbursement Obligations, and/or the Employee Benefits Obligations, shall not affect the Debtors' right to contest the amount or validity of any prepetition Workforce Obligation, including without limitation, any amounts that may be due to any taxing authority.

15. Neither the provisions of this Final Order, nor any payments or not made by the Debtors pursuant to this Final Order, shall be deemed an assumption or rejection of any Workforce Program, agreement or contract, or otherwise affect the Debtors' rights under section

365 of the Bankruptcy Code to assume or reject any executory contract between the Debtors and any member of the Workforce, or other person.

16. Notwithstanding anything to the contrary in this Final Order, the Debtors retain their right to modify or terminate any Workforce Program to the extent that such right exists under the terms of the Workforce Program or as may be required by applicable law provided, however, that the Debtors shall seek court approval, on notice, of any modification that would implicate any portion of section 503(c) of the Bankruptcy Code.

17. Notwithstanding the relief granted herein or any actions taken hereunder, nothing contained in this Final Order shall create any rights in favor of, or enhance, limit or change the status of any claim held by, any member of the Workforce, or other person.

18. Neither the provisions contained herein, nor any actions or payments made by the Debtors pursuant to this Final Order, shall be deemed an admission as to the validity of any underlying obligation or a waiver of any rights the Debtors may have to dispute such obligation on any ground that applicable law permits.

19. Notwithstanding any other provision of this Final Order, no payments to any individual Employee or Temporary Staff pursuant to this Final Order on account of prepetition obligations shall exceed the amounts set forth in 11 U.S.C. §§ 507(a)(4) and 507(a)(5).

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

21. 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.

22. 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.

23. 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

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UNITED STATES BANKRUPTCY JUDGE