

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	X	Chapter 11
	:	
	:	Case No. 19-11563 (KBO)
	:	
EMERGE ENERGY SERVICES LP, <i>et al.</i> , ¹	:	Jointly Administered
	:	
Debtors.	:	Hearing Date: August 14, 2019 at 11:00 a.m. (ET)
	X	

TIDEWATER’S OBJECTION TO DEBTORS’ MOTIONS FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO (1) REJECT CERTAIN RAILCAR LEASE AGREEMENTS *NUNC PRO TUNC* TO THE PETITION DATE AND ENTER INTO PROPOSED NEW RAILCAR LEASE AGREEMENTS EFFECTIVE AS OF THE PETITION DATE; AND (2) REJECT CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES *NUNC PRO TUNC* TO THE PETITION DATE AND ABANDON ANY PERSONAL PROPERTY IN CONNECTION THEREWITH

TO THE HONORABLE KAREN B. OWENS, UNITED STATES BANKRUPTCY JUDGE:

Tidewater Logistics Corp. (“**Tidewater**”), as creditor to the above referenced Chapter 11 debtors and debtors in possession (collectively, the “**Debtors**”), hereby files this Objection (the “**Objection**”) to (1) the Debtors’ Omnibus Motion for Entry of an Order Authorizing the Debtors to (I) Reject Certain Railcar Lease Agreements *Nunc Pro Tunc* to the Petition Date and (II) Enter into Proposed New Railcar Lease Agreements Effective as of the Petition Date; and (2) the Debtors’ First Omnibus Motion for Entry of an Order Authorizing the Debtors to (I) Reject Certain Executory Contracts and Unexpired Leases *Nunc Pro Tunc* to the Petition Date and (II) Abandon any Remaining Personal Property in Connection Therewith (collectively, the “**Motions**”). In support of this Objection, Tidewater respectfully represents as follows:

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



1. The Debtors are seeking to reject their Terminal, Transloading and Storage Agreement with Tidewater (the “**Contract**”) while simultaneously rejecting numerous railcar lease agreements and abandoning 246 rail cars at Tidewater’s facility – effectively using Tidewater’s facility as a storage lot, thus preventing unfettered business operations. Debtors’ Motions intentionally omit the fact that, by rejecting the contracts and abandoning the railcars on Tidewater’s property, Debtors are seeking to involuntarily use Tidewater’s property as a storage facility for the “abandoned” railcars. Tidewater is not able to conduct business in the ordinary course and is suffering substantial harm every day that the abandoned railcars remain on its property.

2. Pursuant to the Contract that is being rejected, there is a railcar storage fee of \$45 per car, per day for cars over the rail car space maximum. See Contract, at p. 10. Because the Debtors are rejecting the contract and therefore not performing under the contract, Tidewater should be able to charge at a minimum the contract rate, but more likely the normal and customary market rate from the Petition Date through the date the cars are removed. (the “**Storage Charges**”).

3. Tidewater maintains possessory warehouseman liens over the rail cars and their contents pursuant to Tex. Bus. & Com. Code § 7.209 to the extent of the Storage Charges. Section 7.209(a) provides, in pertinent part:

A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law.

4. As explained in *American Jurisprudence*, “[t]his provision defines the warehouse’s statutory lien and creates a statutory possessory lien in favor of the warehouse on the

goods stored with the warehouse or on proceeds of the goods.” 78 Am. Jur. 2d Warehouses § 69 (emphasis added) (citing U.C.C. § 7-209, Official Comments 1 and 3).

5. Tidewater is storing the rail cars as a warehouseman, and therefore maintains a statutory possessory lien over the rail cars and their contents to the extent of the Storage Charges.

6. Tidewater does not oppose the Debtors’ rejection of the Contract. However, this is not a retail store in a mall where the Debtors have abandoned shelving and fixtures that have to be cleaned out before the space can be re-let – FF&E that can be put in a dumpster or dragged out to the curb for disposal. Here, the Debtor has abandoned hundreds of rail cars – more than 8000 tons of steel rail cars (assuming they are empty – many of which are not) that will need to be moved by locomotive (that will need to be hired) to some other facility.

7. The Debtors should not be allowed to abandon these railcars in Tidewater’s yard, however, if the Court is inclined to allow the simultaneous abandonment of the railcars and rejection of the Contract, Tidewater should be entitled to an administrative claim against the Debtors for the full amount of post petition Storage Charges, plus any future storage costs until the cars are removed by the Lessors. Tidewater is providing a clear benefit for storing and maintaining the railcars at great detriment to its own business. If the Debtors are permitted to compel Tidewater to provide free storage of the railcars, every similarly situated debtor would propose this arrangement in order to avoid the cost and resources associated with maintaining, storing, or transporting large pieces of collateral. The Debtors’ rejections and abandonment should not be allowed until the railcars are removed from Tidewater’s property.

8. If the Court allows the rejection and abandonment but is not inclined to grant Tidewater an administrative claim, in the alternative, and as a matter of equity, Tidewater requests that the Court require that the rail car lessors remove the rail cars within 10 days after

entry of the Court's order approving the rejection of the leases. If the lessors fail to timely remove the rail cars, the Court should enter an order that allows Tidewater to immediately exercise all rights and remedies with respect to the rail cars in its possession (including but not limited to Tex. Bus. & Com. Code § 7.210), including asserting a first priority lien, removal of the rail cars from the Tidewater facility and attempting to sell the rail cars and their contents to satisfy the Storage Charges and eliminate additional postpetition claims against the Debtors.

9. Finally, Tidewater reserves all rights arising from the Debtors' rejection and abandonment of the Contract, including Tidewater's right to assert a secured claim against the Debtors for the Storage Charges as part of its claim for rejection damages.

[Concluded on following page]

WHEREFORE, for the reasons set forth herein, Tidewater respectfully requests that the Court enter an order (i) denying the Motions presently proposed by the Debtors; (ii) granting Tidewater an administrative claim against the Debtors for the cost of storage of the railcars at the prevailing market rate; and/or (iii) permitting Tidewater to exercise all rights and remedies with respect to the rail cars in its possession (including but not limited to Tex. Bus. & Com. Code § 7.210), including removal of the rail cars from the Tidewater facility and attempting to sell the rail cars and their contents to satisfy the Storage Charges and eliminate additional post-petition claims against the Debtors; and (iv) for such other relief the Court deems just and proper under the circumstances.

Dated: July 30, 2019

**Respectfully submitted by
COLE SCHOTZ P.C.**

/s/ Patrick J. Reilley _____

Patrick J. Reilley (No. 4451)
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Telephone: (302) 652-3131
Facsimile: (302) 652-3117
Email: preilley@coleschotz.com

and

Michael D. Warner
301 Commerce Street, Suite 1700
Fort Worth, TX 76102
Telephone: (817) 810-5265
Facsimile: (817) 977-1611
Email: mwarner@coleschotz.com

and

Daniel F.X. Geoghan
Matthew V. Dunn
1325 Avenue of the Americas, 19th Floor
New York, NY 10019
Telephone: (212) 752-8000
Facsimile: (212) 752-8393
Email: dgeoghan@coleschotz.com
Email: mdunn@coleschotz.com

Counsel to Tidewater Logistics Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2019, a true and correct copy of the foregoing **Objection** was sent via ECF Noticing to all parties receiving ECF Notices in these chapter 11 cases and by First Class Mail on parties listed below.

COLE SCHOTZ P.C.

/s/ Patrick J. Reilley

Patrick J. Reilley (No. 4451)
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Telephone: (302) 652-3131
Facsimile: (302) 652-3117
Email: preilley@coleschotz.com

Emerge Energy Services LP
5600 Clearfork Main Street
Suite 400
Fort Worth, TX 76109

Juliet M. Sarkessian
U.S. Trustee's Office
844 King Street
Room 2207
Lockbox #35
Wilmington, DE 19899-0035

Lisa Burton, Esq.
George A. Davis, Esq.
Blake T. Denton, Esq.
Keith A. Simon, Esq.
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022

Travis J. Cuomo, Esq.
John Henry Knight, Esq.
Brett M. Haywood, Esq.
Paul N. Heath, Esq.
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801

Zachary I Shapiro, Esq.
Richards, Layton & Finger, P.A.
920 North King Street, P.O. Box 551
Wilmington, DE 19801