

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

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 In re: : Chapter 11  
 :  
 EMERGE ENERGY SERVICES LP, *et al.*,<sup>1</sup> : Case No. 19-11563 (KBO)  
 :  
 Debtors. : (Jointly Administered)  
 :  
 ----- X **Re: Docket No. 87**

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

Upon the motion (the “**Motion**”)<sup>2</sup> of the Debtors for entry of an Order under sections 105(a), 363(b), 503(b)(9), 1107(a), and 1108 of the Bankruptcy Code and Bankruptcy Rule 6003 (i) authorizing, but not directing, the Debtors to pay, in the ordinary course of business, the prepetition fixed, liquidated, and undisputed claims of the critical vendors and service providers, subject to the conditions described herein, (ii) authorizing financial institutions to honor and process related checks and transfers, and (iii) granting certain related relief; and the Court having reviewed the Motion, the Gaston Declaration; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012; and the Court having found that this is a core proceeding

<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 such terms in the Motion.



pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States Constitution; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and the Court having determined that there is good and sufficient cause for the relief granted in this order, it is hereby

**ORDERED, ADJUDGED, AND DECREED THAT:**

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 All objections to the entry of this Order, to the extent not withdrawn or settled, are overruled.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

between such Critical Vendor and the Debtors, then the Debtors reserve their rights to take any and all actions necessary to return the parties to the positions they held immediately prior to entry of this Order with respect to all prepetition claims, including but not limited to: (i) declaring that any Trade Agreement between the Debtors and such Critical Vendor is terminated; and (ii) taking any and all appropriate steps to cause such Critical Vendor to repay payments made to such Critical Vendor on account of its Prepetition Claim to the extent that such payments exceed the postpetition amounts then owing to such Critical Vendor, without giving effect to any rights of setoff, claims, provision for payment of reclamation or trust fund claims, or other defense. Nothing herein shall constitute a waiver of the Debtors' rights to seek damages or other appropriate remedies against any breaching Critical Vendor.

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

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

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

9. The Debtors shall maintain a matrix of Critical Vendors and their potential Critical Vendor Claims summarizing (i) the name of the Critical Vendor, (ii) the amount and timing of any payment, and (iii) a summary of the payment terms (the “**Schedule**”). The Debtors shall provide the Official Committee of Unsecured Creditors appointed in these Chapter 11 Cases (the “**Committee**”) and the United States Trustee for the District of Delaware with an updated Schedule on a monthly basis.

10. The Debtors shall provide two (2) business days’ notice (the “**Committee Notice Period**”) to the Committee prior to (a) making any payment of a Critical Vendor Claim in excess of \$50,000, or (b) granting any preference waiver in connection with the payment of a Critical Vendor Claim. The Debtors shall attempt to resolve any objection of the Committee to a proposed payment of a Critical Vendor Claim in excess of \$50,000 or proposed preference waiver in good faith. To the extent a consensual resolution to the objection cannot be reached, the Committee shall file an objection on the docket, and the Debtors shall notice the objection for hearing at the next omnibus hearing, or seek an expedited hearing, to determine the appropriateness of the proposed payment or preference waiver; *provided that*, nothing in this Order shall limit the Debtors from making any payments in connection with a contested payment of a Critical Vendor Claim while such an objection is pending; and *provided further that*, if the Court sustains an objection with respect to a contested payment of a Critical Vendor Claim, all

rights are reserved with regards to any and all actions necessary to cause such Critical Vendor to repay such payment, including by seeking disgorgement.

11. Nothing in the Motion or this Order, or the Debtors' payment of any claims pursuant to this Order, shall be deemed or construed as: (i) an admission as to the validity of any claim against any Debtor or the existence of any lien against the Debtors' properties; (ii) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; (iv) an implication or admission that any particular claim would constitute a Critical Vendor Claim; (v) an assumption or rejection of any executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code; or (vi) a limitation on the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to this Order. Nothing contained in this Order shall be deemed to increase, decrease, reclassify, elevate to an administrative expense status, change the priority, or otherwise affect the Critical Vendor Claims to the extent they are not paid.

12. Nothing in the Motion or this Order, nor the Debtors' implementation of the relief granted in this Order, shall be deemed to modify or waive any of the Debtors' rights with respect to goods and services requested or received from the Critical Vendors, including the Debtors' rights to (i) cancel a purchase order, (ii) decline the acceptance of goods and/or services, (iii) return any defective, nonconforming or unacceptable good, or (vi) contest the amount of any invoice or claims on any grounds.

13. At the direction of the Debtors, the Debtors' banks and financial institutions shall be and hereby are authorized to receive, process, honor, pay, and, if necessary, reissue all prepetition and postpetition checks and fund transfers, including prepetition checks and electronic payment and transfer requests that the Debtors reissue or re-request postpetition, on

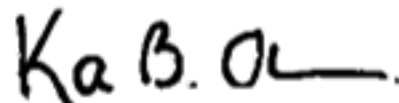
account of obligations owed to any Critical Vendor, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. The Debtors' banks and other financial institutions are authorized to rely on the representations of the Debtors as to which checks and fund transfers should be honored and paid pursuant to this Order.

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

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

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

**Dated: August 13th, 2019**  
**Wilmington, Delaware**



**KAREN B. OWENS**  
**UNITED STATES BANKRUPTCY JUDGE**

**Exhibit 1**

Trade Agreement

\_\_\_\_\_, 2019

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

### **Trade Agreement**

As you may be aware, on July 15, 2019 (the "**Petition Date**"), Emerge Energy Services LP, together with certain of its affiliates (collectively, the "**Debtors**"), filed voluntary petitions (the "**Bankruptcy Cases**") under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**"). On the July 24, 2019, we requested the Bankruptcy Court's authority to pay certain vendors and service providers in recognition of the importance of our relationship with such vendors and service providers. On [\_\_\_\_], 2019, the Bankruptcy Court entered an order (the "**Order**") authorizing us, under certain conditions, to pay in the ordinary course prepetition claims of certain vendors and service providers that agree to be bound by the terms of the Order and to the terms set forth below. A copy of the Order is enclosed.

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

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

1. For purposes of this Trade Agreement, the estimated balance of your prepetition claim (accounting for any setoffs, credits or discounts) (the "**Prepetition Claim**") is \$[\_\_\_\_\_]. The Prepetition Claim will be paid as follows: [\_\_\_\_\_].
2. The open trade balance or credit line you will extend shall be on normal and customary terms on an historical basis for the period prior to the Petition Date or, if more favorable, within the sixty day period prior to the Petition Date.
3. If you receive payment in full on account of a Prepetition Claim you are not permitted to, with respect to such Prepetition Claim, file or perfect a Lien (a "**Lien**") on account of such claim, assert a claim for reclamation (a "**Reclamation Claim**"), and/or assert a claim under section 503(b)(9) of the Bankruptcy Code (a "**503(b)(9) Claim**"), and you shall take all necessary action, at your expense, to remove any existing Lien relating to such claim, and to withdraw any Reclamation Claim or 503(b)(9) Claim, on account of such claim.
4. You will hereafter extend to the Debtors all Customary Trade Terms, which are:



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

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

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

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

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

Sincerely,

[Debtor]

By:

Its:

Agreed and Accepted by:

[Name of Critical Vendor/Service Provider]

By:

Its:

Dated: