

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

EMERGE ENERGY SERVICES LP,
et al.,¹

Debtors.

Chapter 11

Case No. 19-11563 (KBO)
(Jointly Administered)

Related D.I.: 362

Hearing Date: 10/24/19 @ 1:00 p.m.

MINNESOTA COMMERCIAL RAILWAY COMPANY'S OBJECTION TO
CONFIRMATION OF FIRST AMENDED JOINT PLAN OF REORGANIZATION FOR
EMERGE ENERGY SERVICES LP AND ITS AFFILIATE DEBTORS UNDER
CHAPTER 11 OF THE BANKRUPTCY CODE

Minnesota Commercial Railway Company ("MCR"), by and through its undersigned counsel, hereby files this objection to confirmation of the *First Amended Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* [D.I. 362] (the "**Plan**"). In support of this objection, MCR respectfully states:

BACKGROUND

A. The Bankruptcy Case

1. On July 15, 2019 (the "**Petition Date**"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with this Court. Since the Petition Date, the Debtors have remained in possession of their assets and have continued to operate and manage their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

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



2. On July 25, 2019, the Debtors filed their *Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code* [D.I. 98] (as amended by D.I. 362, the “**Amended Plan**”) and a *Disclosure Statement* for the same [D.I. 99] (as amended by D.I. 363, the “**Disclosure Statement**”). According to the Amended Plan and Disclosure Statement, there are ten classes of claimholders, only two of which are impaired and entitled to vote on the Plan—“Prepetition Notes Claims” and “General Unsecured Claims.” Plan, Art. III.A.

3. The Plan provides that Class 2 claimholders (“**Other Secured Claims**”) are unimpaired and are “Deemed to Accept.” *Id.* While not immediately apparent from the Amended Plan, the Disclosure Statement provides as follows with respect and to which claims are subject to treatment as Other Secured Claims in the context of its discussion of what it refers to as “M&M Liens.” Specifically, the Disclosure Statement states

In some cases, vendors have asserted liens (“**M&M Liens**”) to secure allegedly accrued and unpaid amounts owing under prepetition contracts with the Debtors. The Debtors are aware of the assertion of M&M Liens filed against various of the Debtors’ properties at which the subject work and/or services were allegedly supplied. These properties include Debtor-owned property at Kingfisher, Oklahoma, Kosse, Texas, San Antonio, Texas, and Chippewa County, Wisconsin. The Debtors continue to examine the validity and perfection of such liens and their related claims, as well as the relative priority of any such valid and perfected liens relative to other valid and perfected liens on the affected properties. To the extent any valid and perfected M&M Liens enjoy a priority in respect of the affected property sufficient to render the related claims secured, *those claims will be treated as Other Secured Claims under the Plan, while any deficiencies will be treated as General Unsecured Claims.* The Debtors continue to reserve all rights in respect of the asserted M&M Liens.

Disclosure Statement, Art. II.C.3. (emphasis added).

4. On September 11, 2019, the Court entered its order approving the Disclosure Statement [D.I. 361] (the “**DS Order**”).

5. On October 4, 2019, the Debtors filed their *Notice of Filing of Plan Supplement for [the Plan]* [D.I. 436].

6. The Amended Plan does not provide for payment of MCR's statutory lien in the Stored Railcars as a secured claim. Moreover, SSS has failed to provide any valuation information with respect to the Stored Railcars.

7. The hearing on confirmation of the Plan is set for October 24, 2019.

8. On October 14, 2019, MCR requested a continuance to object to the Plan, and SSS granted a continuance to object to the Plan through October 16, 2019.

B. Background Related to MCR

9. MCR has possession of approximately 130 railcars leased by debtor Superior Silica Sands LLC ("SSS" or the "Debtor"). The railcars have been stored at MCR for some time pursuant to a Track Lease Agreement between MCR and SSS.

10. The railcars are stored at MCR pursuant to a Track Lease Agreement ("Track Lease") between the SSS and MCR. The Track Lease expired on its own terms on March 22, 2019. Nevertheless, SSS filed a motion to reject certain executory contracts and unexpired leases, and the court entered an order authorizing the rejection of the Track Lease *nunc pro tunc* to the petition date. (D.I. 207, Exhibit 1, page 7, item no. 26).

11. MCR has a statutory lien ("Statutory Lien") in the stored railcars (the "Stored Railcars") pursuant to Minn. Stat. §514.18, which governs lien interests in personal property. It provides that whoever, at the request of the owner or legal possessor of any personal property, shall store or care for the property shall have a lien upon such property for the price or value of such storage and the right to retain possession of the property until such lien is lawfully discharged. Minn. Stat. §518.14, Subd. 1.

12. The Statutory Lien in Minn. Stat. §514.18 automatically arises when the owner or legal possessor of personal property entrusts that property to a bailee for storage, and no filing is required. *Dusenbury v. Hawks*, 895 N.W.2d 640, 644-45 (Minn. Ct. App. 2017) (citing *In re: Serbus*, 53 B.R. 187, 188-89 (Bankr. D. Minn. 1985)). The Statutory Lien has priority over previously granted security interests on personal property. *Id.* at 645 (citing *Stebbens v. Balfour*, 157 Minn. 135, 137, 195 N.W. 773, 774 (1923) (holding that the bailee’s lien is “intended to be superior” to previously granted security interests)).

13. In addition, Article 2A specifically provides that:

If a person in the ordinary course of his [or her] business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this Article unless the lien is created by statute and the statute provides otherwise ...

Minn Stat. §336.2A-306.

14. SSS filed a motion to reject certain railcar lease agreements with certain third party lessors, and requested authority for the SSS to enter into new railcar lease agreements with those lessors. The court entered an order authorizing the rejection of these railcar lease agreements on August 14, 2019, *nunc pro tunc* to the date of filing, and authorizing SSS to enter into new railcar lease agreements. (D.I. 208, Schedule 1, Schedule 2, and Schedule 3).

15. Neither the motion nor the court order provides sufficient information to identify which (if any) of the Stored Railcars are subject to the new post-petition railcar leases (“The New Railcar Leases”). The lessors scheduled for lease rejection (and potential New Railcar Leases) include:

- a. Trinity Industries Leasing Company;
- b. MUL Railcar Leasing LLC;
- c. CIT Bank, N.A.; and

d. CIT Group/Equipment Financing, Inc.

16. MCR's Statutory Lien remains in effect with respect to the New Railcar Leases. A lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor. Minn. Stat. §336.2A-307, Subd. 2.

17. To the extent that the Stored Railcars are subject to the New Railcar Leases, MCR's Statutory Lien continues in the Stored Railcars, but the Debtor has failed to provide for payment of MCR's Statutory Lien.

18. In light of the Debtors' failure to comport with its obligations under the DS Order and Section 1129(a) of the Bankruptcy Code, MCR objects to confirmation of the Amended Plan.

19. Section 1129 (a) of the Bankruptcy code provides that "[t]he court shall confirm a plan only if it complies with all of the applicable requirements" of that section. 11 U.S.C. §1129(a). The Debtor bears the burden of proof with respect to the confirmation requirements, and must do so by a preponderance of the evidence. *In re Armstrong World Industries, Inc.*, 348 B.R. 111, 120 (D. Del. 2006); *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 46 (Bankr. D. Del. 2000).

20. A plan may only be confirmed if, with respect to each class of claims or interests, such class has either (i) accepted the plan or (ii) is not impaired under the plan. See 11 U.S.C. §1129(a)(8). To the extent a class is not impaired under a plan, that class, and each holder of a claim within that class, are conclusively presumed to have accepted the plan. See 11 U.S.C. §1126(f); *In re Energy Future Holdings Corp.*, 540 B.R. 109, 112 (Bankr. D. Del. 2015). MCR asserts that the Plan impairs its Statutory Lien by failing to pay it in full.

21. The Debtors contend "Other Secured Creditors" are unimpaired, and thus deemed to have conclusively accepted the plan. Under 11 U.S.C. §1124(1) a class of claims is

impaired unless the plan “leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest.” Here, the Plan fails to address retention of liens, and the Creditors submit that the Plan’s failure to include retention of their liens means their “Other Secured Claims” are, in fact, impaired within the meaning of § 1124.

22. MCR has a Statutory Lien in the Stored Railcars pursuant to Minn. Stat. §514.18. MCR’s claim is secured to the full extent of its claim in each Stored Railcar. The Plan fails to provide valuation regarding the Stored Railcars and it fails to pay MCR’s Statutory Lien in full. For that reason alone, the Amended Plan may not be confirmed.

23. Given that its claims are not unimpaired, MCR cannot be deemed to have accepted the Plan. Because it has not accepted the Plan, under the “best interest of creditors” test it must “receive or retain under the plan on account of such claim . . . property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.” See 11 U.S.C. §1129(a)(7); Energy Future Holdings, 540 B.R. at 112.

24. The Debtor has failed to establish that the Amended Plan meets the best interest of creditors test.

CONTESTED MATTER

25. Pursuant to Bankruptcy Rule 9014, confirmation of the Plan is a contested matter and MCR reserves all rights to seek discovery and present evidence at the Confirmation Hearing.

RESERVATION OF RIGHTS

26. MCR reserved all of its rights, claims, defenses, and remedies, including, without limitation, the right to amend, modify, or supplement this Objection, to seek discovery, and to raise additional objections during the confirmation hearing.

CONCLUSION

WHEREFORE, MRC respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief as the Court deems just and proper.

Dated: October 15, 2019

FINEMAN, KREKSTEIN & HARRIS

/s/ Deirdre M Richards

Deirdre Richards (No.4191)

1300 N. King Street

Wilmington, DE 19801

Telephone: (302) 538-8331

E-mail: drichards@finemanlawfirm.com

*Counsel for Minnesota Commercial Railway
Company*

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

<p>In re:</p> <p>EMERGE ENERGY SERVICES LP et al.,¹</p> <p style="text-align: center;">Debtors.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Chapter 11</p> <p>Case No. 19-11563 (KBO)</p> <p>(Jointly Administered)</p>
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CERTIFICATE OF SERVICE

I, Deirdre M. Richards, certify that on October 15, 2019, I caused to be serve the *Minnesota Commercial Railway Company’s Objection To Confirmation of First Amended Joint Plan of Reorganization For Emerge Energy Services LP and Its Affiliate Debtors Under Chapter 11 of The Bankruptcy Code* on the below listed individuals as indicated thereon:

Via U.S. First Class Mail & Email

Keith A. Simon, Esq. keith.simon@lw.com,
Hugh K. Murtagh, Esq. hugh.murtagh@lw.com
Liza L. Burton, Esq. liza.burton@lw.com
Latham & Watkins LLP
885 Third Avenue
New York, New York 10022-4834

Matt S. Barr, Esq. matt.barr@weil.com
David Griffiths, Esq. david.griffiths@weil.com
Candace M. Arthur, Esq.
candace.arthur@weil.com
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York
10152-0119

Todd C. Meyers, Esq.
tmeyers@kilpatricktownsend.com,
David M. Posner, Esq.
dposner@kilpatricktownsend.com
Kelly Moynihan, Esq.
kmoynihand@kilpatricktownsend.com
Kilpatrick Townsend & Stockton LLP,
1114 Avenue of the Americas,
New York, New York 10036

Lenard M. Parkins, Esq. (email:
lparkins@kilpatricktownsend.com)
Kilpatrick Townsend & Stockton LLP,
700 Louisiana Street, Suite 4300
Houston, Texas 77002

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.

VIA Hand Delivery & E-mail

John H. Knight, Esq. knight@rlf.com
Paul N. Heath, Esq. heath@rlf.com);
Richards, Layton & Finger, P.A.,
One Rodney Square
930 North King Street
Wilmington, Delaware 19801

Laura Davis Jones, Esq. ljones@pszjlaw.com
Pachulski Stang Ziehl & Jones, LLP
919 North Market Street
Wilmington, DE 19801

Jeremy W. Ryan, Esq.
jryan@potteranderson.com
Christopher M. Samis, Esq.
csamis@potteranderson.com,
D. Ryan Slaugh, Esq.
rslaught@pottersanderson.com);
Potter Anderson & Corroon LLP
1313 North Market Street, Sixth Floor
P.O. Box 951
Wilmington, Delaware 19899

Juliet M. Sarkessian, Esq.
Juliet.M.Sarkessian@usdoj.gov
Office of the United States Trustee for the
District of Delaware
844 King Street, Suite 2207
Wilmington, Delaware 19801

FINEMAN KREKSTEIN & HARRIS

By: /s/ Deirdre M. Richards
Deirdre M. Richards (#4191)