

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

In re

EMERGE ENERGY SERVICES LP, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 19-11563 (KBO)

**Related D.I.: 362, 466**

**JOINDER AND OBJECTION OF RB SCOTT COMPANY, INC. 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**

RB Scott Company, Inc. (“**RBS**”), by and through its undersigned counsel, hereby files this objection (the “**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**”) and joinder to the objections of similarly situated mechanics lien claimants to the extent not otherwise inconsistent with this Objection. In support of this Objection, RBS 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.

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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.



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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 “**Plan**”) and a *Disclosure Statement* for the same [D.I. 99] (as amended by D.I. 363, the “**Disclosure Statement**”). According to the same, there are ten classes of claimholders, only two of which are entitled to vote on the Plan—“Prepetition Notes Claims” and “General Unsecured Claims.” Plan, Art. III.A. The Plan provides that Class 2 claimholders (“**Other Secured Claims**”) are unimpaired and are “Deemed to Accept.” *Id.* While not immediately apparent from the Plan, the Disclosure Statement provides clarity as 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).

3. Furthermore, a liquidation analysis (the “**Liquidation Analysis**”) attached to the Disclosure Statement as Exhibit D estimates “Other Secured Claims” at approximately \$17.3 million, projecting to a recovery of between 2.5% to 22.9% on their claims; these

recoveries amount to approximately \$441,000 to \$3,971,000. Disclosure Statement, Exh. D, p.3. The Liquidation Analysis provides in its footnotes that “Lien claims listed as other secured primarily relate to specific assets at the Kingfisher, OK plant (under construction). Any assumed recovery is related specifically to any potential proceeds from the sale of those particular assets.” *Id.* at p.6. As has been previously raised in these cases, the Debtors provide virtually no breakdown or substance in support of their valuation estimates. *See, e.g., Pownall Services, LLC’s Objection to the Debtors’ Disclosure Statement* [D.I. 276]. Importantly, they likewise fail to provide any insight as to the fate of the Oklahoma Kingfisher site or the equipment residing thereon. *See, e.g., Disclosure Statement, Art. III.C.2.* (“the Debtors have not reached a conclusion whether, or when, completion of the Kingfisher project will be both advisable and feasible. The Debtors continue to actively evaluate their options at Kingfisher”).

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

#### **B. Background Related to RBS**

7. Prior to the Petition Date, RBS provided labor, services, materials and/or equipment for the improvement of the Debtors’ property located in Oklahoma and Wisconsin (collectively, the “**Properties**”). As has been detailed in both RBS’s proof of claim [Claim No. 252] and *Notice of Perfection of Liens Pursuant to 11 U.S.C. § 546(b)(2)* [D.I. 429], as well as in

the Debtors' schedules of assets and liabilities and statement of financial affairs, RBS maintains mechanics liens and claims on the Properties approximating \$1.8 million.<sup>2</sup>

8. Following the entry of the DS Order, the Debtors issued to RBS a Class 6 General Unsecured Claims Ballot, which was prepopulated with the \$872,526.06 GUC amount (i.e. an amount *exclusive* of any purported deficiency amount). A copy of the ballot is attached hereto as **Exhibit A**. Notwithstanding that the Debtors aver Other Secured Claims like RBS's Secured Claims are projected to receive only 2.5% on the low end of their estimate—thus rendering its Secured Claims almost entirely general unsecured deficiency claims under Class 6—RBS received no ballot for its deficiency claims.

9. The Debtors own service records confirm this. On or about September 13, 2019, the Debtors purported to serve materials (the “**Solicitation Materials**”) related to solicitation of the Plan in accordance with the DS Order. Service of the same is reflected in the *Affidavit of Service* filed on September 20, 2019 at D.I. 390 (the “**AOS**”), which RBS appears on as a Class 6 claimholder. *See* AOS, Exh. G.<sup>3</sup> At no other time on the docket do the Debtors attest to have served RBS or similarly styled mechanics lienholders with the Solicitation Materials as they relate to their purported deficiency claims; upon information and belief, the Debtors have not done so.

10. On October 9, 2019, RBS assigned its Secured Claims to a new entity (the “**Pownall Entity**”) under the ownership of Pownall Services LLC (“**Pownall**”). Upon information and belief, the Pownall Entity submitted a credit bid for the purchase of the Kingfisher site based on similarly assigned mechanics lien claims filed against the Kingfisher

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<sup>2</sup> As the POC details, this figure breaks down to \$872,526.06 in unsecured claims (the “**GUCs**”) and \$902,721.75 in secured mechanics lien claims (the “**Secured Claims**”).

<sup>3</sup> The AOS also suggests RBS was served with an “Unimpaired Claims/Equity Notice” around the same time. *See id.* at Exh. M. Upon information and belief, RBS is unaware of any such service, to the extent relevant.

property (the “**Kingfisher Credit Bid**”); the total value of the claims assigned is approximately \$10,207,973.59, far in excess of the estimated value set forth in the Liquidation Analysis, even on the high end. Further details on the Kingfisher Credit Bid are available in *Pownall Services, LLC’s Objection to Debtors’ First Amended Joint Plan of Reorganization* [D.I. 466] (the “**Pownall Objection**”), filed contemporaneously herewith.

### **JOINDER AND OBJECTION**

11. 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 section 1129(a).<sup>4</sup> The Debtors bears the burden of proof with respect to the confirmation requirements by a preponderance of the evidence.<sup>5</sup>

12. For the reasons set forth in the Pownall Objection, which RBS joins in to the extent not inconsistent with the instant Objection,<sup>6</sup> RBS submits that the Plan should not be confirmed as is. The Kingfisher Credit Bid decisively rejects the valuation asserted by the Debtors, and no plan should be confirmed that does not compensate Other Secured Claims at least at the level of what would have been achieved through the Kingfisher Credit Bid. On those grounds alone, the Plan fails.

13. In addition, the Debtors failed to abide by the terms of the DS Order. As the Debtors have abundantly made clear in the Plan, Disclosure Statement, and DS Order, the Debtors purportedly intend any deficiency claim stemming from a Class 2 Other Secured Claim to be treated as a Class 6 General Unsecured Claim. According to even the earliest filed versions

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<sup>4</sup> 11 U.S.C. § 1129(a).

<sup>5</sup> *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).

<sup>6</sup> RBS likewise joins any other objection filed by a similarly situated Other Secured Claimant, to the extent not inconsistent with RBS’s arguments set forth herein.

of the Disclosure Statement, the Debtors averred that as much as 97.5% of the Other Secured Claims would not be satisfied by the collateral to which they attached, creating massive additional GUCs in the process. Notwithstanding, the Debtors failed to issue ballots in connection with those deficiency amounts. The Court should not condone any attempt by the Debtors to circumvent section 1129 (or their obligations of good faith) by seeking Class 6's vote without considering the substantial number of deficiency claimants.<sup>7</sup>

### **CONTESTED MATTER**

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

### **CONCLUSION**

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

*[Remainder of page intentionally left blank]*

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<sup>7</sup> If all the provisions of section 1129(a) are established, except for section 1129(a)(8), the Plan can only be confirmed pursuant to section 1129(b), which requires that the Plan: (1) is fair and equitable, and (2) does not discriminate unfairly. A plan is fair and equitable if each holder in a class of unsecured claims either "receive[s] or retain[s] on account of such claim property of a value ... equal to the allowed amount of such claim," or the "holder of any claim or interest that is junior to the claim of such class will not receive or retain under the plan on account of such junior claim or interest any property." The "determination of the Debtor's value directly impacts the issues of whether the proposed plan is 'fair and equitable.'" A "corollary of the absolute priority rule is that a senior class cannot receive more than full compensation for its claims."

A plan unfairly discriminates against a class if another class of equal rank in priority will receive greater value under the plan than the non-accepting class without reasonable justification. Discrimination is presumptively unfair in two circumstances: (1) if the plan specifies materially different percentage recoveries for two classes having the same priority; and (2) a plan that allocates dissenting classes consideration containing risks materially greater than those assumed under the plan by other similar assenting creditors.

Dated: October 11, 2019  
Wilmington, DE

BAYARD, P.A.

/s/ Evan T. Miller

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*Counsel for RB Scott Company, Inc.*

# **Exhibit A**



**Item 1. Amount of Claim.**

The undersigned hereby certifies that as of the Voting Record Date (the close of business on September 9, 2019), the undersigned was the Holder of Class 6 – General Unsecured Claims against the Debtors in the following unpaid amount (insert unpaid amount in box below if not already completed):

\$872,526.06
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**Item 2. Vote on Plan.**

The Holder of the Class 6 – General Unsecured Claims against the Debtors set forth in Item 1 above votes to (please check one box below):

**PRIOR TO VOTING ON THE PLAN, PLEASE REVIEW THE “IMPORTANT NOTICE REGARDING TREATMENT FOR HOLDERS OF CLASS 6 GENERAL UNSECURED CLAIMS” INCLUDED IN THIS DISTRIBUTION.** Please be advised that if and only if Class 6 votes to **REJECT** the Plan then: On the Effective Date, the Class 6 Claims will be discharged without further notice to, approval of or action by any Person or Entity, **and each Holder of a Class 6 Claim shall not receive any distribution or retain any property on account of such Class 6 Claim.**

☐ **ACCEPT** (vote FOR) the Plan

☐ **REJECT** (vote AGAINST) the Plan

THE DEBTORS RECOMMEND THAT YOU VOTE TO ACCEPT THE PLAN.

**IMPORTANT INFORMATION REGARDING THE RELEASE OF CLAIMS BY THIRD PARTIES**

ARTICLE X OF THE PLAN CONTAINS RELEASE, EXCULPATION AND INJUNCTION PROVISIONS, WHICH ARE SET FORTH AT THE END OF THIS BALLOT. YOU SHOULD REVIEW THESE PROVISIONS CAREFULLY.

Check the box below if you elect not to grant the Third Party Release contained in Article X.B.2 of the Plan. If you are not a signatory to the Restructuring Support Agreement, election to withhold consent is at your option. If you submit your Ballot with this box checked, then you will be deemed **NOT** to consent to the Third Party Release set forth in Article X.B.2 of the Plan. **PLEASE BE ADVISED THAT BY NOT CHECKING THE BOX BELOW YOU ELECT TO GRANT THE THIRD-PARTY RELEASE AGAINST THE “RELEASED PARTIES,” AS THAT TERM IS DEFINED IN THE PLAN, IN EACH AND EVERY CAPACITY IN WHICH YOU HOLD A CLAIM AGAINST, OR EQUITY INTEREST IN, ANY OF THE DEBTORS. YOU MUST AFFIRMATIVELY CHECK THE BOX BELOW IN ORDER TO OPT-OUT OF THE THIRD PARTY RELEASE.**

**CERTIFICATE OF SERVICE**

I, Evan T. Miller, hereby certify that on October 11, 2019, I caused a copy of the foregoing *Joinder and Objection of RB Scott Company, Inc. 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* to be served on the parties below in the manner indicated.

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